86 1739 No.

Supreme Court, U.S.
FILED
APR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

FRANK J. GUARINI, GERALD McCANN, DR. IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN,
Petitioners,

-vs-

THE STATE OF NEW YORK, and THE STATE OF NEW JERSEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether the exclusive, original jurisdiction of the United States Supreme Court precludes and eliminates the power of state courts to entertain claims by taxpayers and citizens of one state against a sister state for injuries arising out of illegal, extra-territorial and unconstitutional exercise of sovereignty and taxing power by the sister state?

2. Whether the doctrine of sovereign immunity gives a state that engages in unconstitutional, extra-territorial activities within the boundaries of a sister state immunity from law suit in the courts of the sister state?

3. Whether taxpayers of a sovereign state have standing to challenge the invasion of their state by a sister state for the purpose of conducting illegal, extra-territorial, unconstitutional activities, particularly where one of the petitioners has been compelled to pay an unconstitutional sales tax to the invading state?

LIST OF PARTIES

The parties before the trial court were Frank J. Guarini, Gerald Mc Cann, Dr. Irwin Silverman, Dr. Lena Edwards, John M. Stiles, Nidia Davila Colon, Harry Bisharian, Walter Irwin, Robert J. Del Tufo, Rev. Raymond J. Kupke and Dr. Sang Jin Kim. Mr. Del Tufo, Rev. Kupke and Dr. Kim did not appeal from the trial court determination. Dr. Edwards passed away after proceedings were instituted in the New Jersey Supreme Court. Therefore, those four persons are not parties to this petition.

The respondents before this Court are the State of New York and the State of New Jersey.

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IN THE
SUPREME COURT OF THE UNITED STATES
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NO.

FRANK J. GUARINI, GERALD McCANN, DR. IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN

Petitioners,

vs.

THE STATE OF NEW YORK and THE STATE OF NEW JERSEY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

The petitioners, Frank J. Guarini, Gerald McCann, Dr. Irwin Silverman, John M. Stiles, Nidia Davila Colon, Harry Bisharian and

Walter Irwin, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supeme Court of New Jersey, entered in the above-entitled proceeding on January 26, 1987, p. 1a, infra.

OPINIONS BELOW

The opinion of the trial court, the Superior Court of New Jersey, Chancery Division, Hudson County, has been approved for publication but has not yet been published. It is reprinted in the appendix hereto, p. 8, infra.

The opinion of the Superior Court of New Jersey, Appellate Division, has not been reported as of this filing. It is reprinted in the appendix hereto, p. 3a, infra.

The judgment of the New Jersey Supreme Court of January 26, 1987 dismissing the appeal and denying review of the decision of the Superior Court of New Jersey, Appellate Division, has not been reported as of this filing. It is reprinted in the appendix hereto, p. 1a, infra.

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on January 26, 1987. That determination dismissed petitioners' appeal and denied review of the decision of the Superior Court of New Jersey, Appellate Division.

Jurisdiction is invoked on the basis of 28 U.S.C. section 1257(3), Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) and Smith v. Reeves,

178 U.S. 436,445 (1900). See also Tribe, American Constitutional Law, sec. 3-35 (1978) ("neither sovereign imunity nor the Eleventh Amendment bars Supreme Court review of state court judgments in suits in which a state is a party, since supremacy of federal law requires a review of federal questions presented by such judgments").

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED

The following provisions of the United States Constitution set forth in the appendix are involved: Art. 1, sec. 8, Cl. 1 and 3; Art. 1, sec. 10; Art. III, sec. 2.; 11th Amendment; 14th Amendment, sec. 1.

The following statutes set forth in the appendix are involved: 4 Stat. 708 (Ch. 126); 28 U.S.C. sec. 1251(a).

STATEMENT OF THE CASE

This law suit is an action by a taxpayer who paid taxes to the State of New York on sales transactions occurring within the State of New Jersey, labor union members who have lost job opportunities because labor contracts have been awarded to New York unions for work performed within New Jersey, and taxpayers and citizens of New Jersey who object to the invasion of New Jersey territory by New York and the usurpation of sovereignty and tax revenues by New York. The petitioners' claim is that Liberty Island (formerly

Bedloes Island) and Ellis Island lie within the sovereign territory of New Jersey, and that these petitioners have been injured by the wrongful, illegal and unconstituional assertion of sovereignty by New York over those islands.

On September 16, 1833, Commissioners representing the two states entered into a Compact "respecting the territorial limit and jurisdiction of said states". That Compact was ratified by the States of New York and New Jersey, N.J.S.A. 52:28-1 et seq.; 56 McKinneys State Law, section 7, and approved by Congress in 1834, 4 Stat. 708, (Ch. 126), pursuant to U.S. Const. Art. 1, Section 10. It is upon this Compact that the petitioners base their claim.

The Compact provides in Article 1

for the delineation of territory and sovereignty and specifies that the division of the two states is the middle of the Hudson River. Article 2 of the Compact provides New York solely with limited police powers over the two islands. This Court, in interpreting the Compact, in Central Railroad Co. v. Mayor and Aldermen of Jersey City, 209 U.S. 472 (1908) ruled that the line of sovereignty is the middle of the river, that jurisdictional powers retained by New York on the New Jersey side of the river were of a limited nature concerning commerce and navigation, and that New Jersey retained taxing power over the lands on the New Jersey side of the river as part of her sovereign rights.

At some point subsequent to the

Compact, New York began to exercise sovereign powers over Ellis Island and Liberty Island, including taxing powers, despite the fact that both islands lie on the New Jersey side of the Hudson River. This exercise of power was without authority and constituted usurpation of the sovereignty of New Jersey. This unlawful extension of the sovereignty of New York extended beyond the boundaries of the islands as they existed in 1834 to include territory below the low water mark of the islands on the New Jersey side of the Hudson River. Ellis Island was originally 2.7 acres and it is now 24.5 acres. Liberty Island has also undergone land fill that has substantially increased its size. Despite the fact that the 1834 Compact gave New Jersey

sovereignty, jurisdiction and title to the land under water surrounding the islands, New York has usurped sovereignty and jurisdiction over the land fill.

Petitioners brought this suit as citizens and taxpayers asking the courts to declare the rights of the parties pursuant to the 1834 Compact and to enjoin New York from exercising sovereignty over Ellis and Liberty islands. Two groups of the petitioners have separate, additional, specific injuries. A sales tax was collected by New York from Nidia Davila Colon when she made certain purchases on Liberty Island. Such taxation by New York within the soverign territory of New Jersey constitutes a violation of the Commerce Clause and Due Process Clause

of the Fourteenth Amendment to the United States Constitution. The petitioners' contention that New York engaged in extra-territorial action by taxing beyond its sovereign borders is directly brought into issue by the collection of the sales tax from Ms. Colon.

Similarly, New York's wrongful assertion of sovereignty over the islands has caused labor contracts to be awarded to New York unions on the basis of New York's claim to sovereignty over the islands. Two of the petitioners, Bisharian and Irwin, have lost job opportunities and have been injured due to the wrongful claim of territory by New York.

This matter was originally filed in the Superior Court of New Jersey.

New York filed a petition to remove the action to the United States District Court for the District of New Jersey. Subsequent thereto, the matter was remanded on petitioners' motion to the Superior Court of New Jersey. New York made a motion to dismiss that was granted on the grounds that the United States Supreme Court has original exclusive jurisdiction over the issues in controversy, the doctrines of sovereign immunity and comity immunize New York from suit within the courts of New Jersey and that all of the petitioners, including the petitioner who was compelled to pay a sales tax to New York, lack standing.

The matter was appealed to the Superior Court of New Jersey, Appellate Division. That court affirmed the

decision of the lower court, p. 3a, infra.

The footnote of the Appellate Division decision, p. 7a, infra, concerning the standing of petitioner Nidia Davila Colon does not fully apprise the Court that the issue of Nidia Davila Colon's standing has been raised from the outset of the case. The complaint and the arguments before both the trial court and the Appellate Division asserted that Petitioner Colon was wrongfully taxed in the amount of $1.35 and that the taxation violated the Compact and the U.S. Constitution.

This point was specifically argued before the trial court in petitioners' brief.

"Second, to the extent that

> New York sales tax law permits the collection of sales tax upon Ellis and Liberty Islands, it is unconstitutional. The transaction that is taxed on the merchandise must be within the taxing state. See McLeod v. J.E. Dilworth Co., 322 U.S. 327, 88 L.Ed. 1304 (1944). Plaintiff Nidia Davila Colon contends that she was taxed by New York for sales transactions that occurred solely in the State of New Jersey."

New York was sufficiently notified of these claims by the complaint. Specifically, the First Count, paragrapn 14 provides:

> 14. The defendant State of New York has wrongfully exercised and continues to exercise jurisdiction and sovereignty over Ellis Island and Liberty Island purportedly pursuant to the Compact of 1834 by engaging in the following activities: (a) levying sales taxes on the islands and collecting those taxes; (b) levying state income tax on persons residing or working on the islands and collecting those

taxes; and (c) exercising police powers over the islands and the persons who live and work on the islands or visit the islands.

The entire Fourth Count specifies the claim of petitioner Nidia Davila Colon:

"1. Plaintiffs adopt the paragraphs set forth in the first, second and third counts.

2. On November 8, 1984 plaintiff Nidia Davila Colon purchased the following items on Liberty Island: a replica of the Statue of Liberty, a banner and a souvenir plate.

3. Incident to the purchase of said item, plaintiff was required to pay $1.35 sales tax to the State of New York and its political subdivisions pursuant to the asserted sovereignty and jurisdiction over Liberty Island by the defendant State of New York.

4. The collection and levy of these taxes by the defendant State of New York and its political subdivisions was ultra vires its sovereign and

jurisdictional power.

> 5. Plaintiff was injured in that she was compelled to pay taxes that were due to the defendant State of New Jersey to the defendant State of New York and its political subdivisions. The amount paid by plaintiff to the defendant State of New York and its political subdivisions was greater than that which she would have been required to pay to the defendant State of New Jersey."

The trial court specifically ruled that the claim of petitioner Nidia Davila Colon that she was wrongfully taxed in the amount of $1.35 was insufficient to confer standing, pp. 42a-43a, infra.

Petitioners filed an appeal and a petition for certification with the New Jersey Supreme Court. That court dismissed the appeal and denied the petition in a determination that was

filed on January 26, 1987.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The original exclusive jurisdiction of the United States Supreme Court does not bar this suit in the state courts of New Jersey because the controversy raised by the law suit is not between two states.

2. There is no federal constitutional principle that prevents citizens of one state from suing another state within the state courts.

3. Taxpayers and citizens of one state have standing to challenge the extra-territorial unconstitutional activities of a sister state within their state, particularly a taxpayer who has been forced to pay a sales tax to the

invading sovereign.

4. The lower court's ruling that the law suit is barred by the doctrine of comity is so intertwined with federal issues that it is not an adequate and independent state ground for dismissing the suit.

POINT I

THE ORIGINAL EXCLUSIVE JURISDICTION OF THE UNITED STATES SUPREME COURT DOES NOT BAR THIS SUIT IN THE STATE COURTS OF NEW JERSEY BECAUSE THE CONTROVERSY RAISED BY THE LAW SUIT IS NOT BETWEEN TWO STATES.

The court below ruled that this matter falls within the exclusive original jurisdiction of the United States Supreme Court because it concerns a border dispute, an abrogation and modification of an interstate compact, or a declaration of

the rights of states under a compact. It is respectfully submitted that under the United States Constitution, the United States Code and the law of original U.S. Supreme Court jurisdiction, the trial court erred in ruling that the U. S. Supreme Court has exclusive original jurisdiction over this case.

28 U.S.C.S., section 1251(a) provides:

> "The Supreme Court shall have original and exclusive jurisdiction over all controversies between two or more states."

This federal statute delegates exclusive jurisdiction on the basis of the identity of the parties, not on the basis of the subject matter of the suit. The issues are not raised by the two states in this law suit. Rather,

they are raised by citizens and taxpayers of one of the states.

State courts have the authority to rule on federal questions. Robb v. Connolly, 111 U.S. 624,637 (1884). See also Wright, Law of Federal Courts, sec. 45 (4th Ed). There is no doctrine that permits a Court to decline to hear claims because the outcome of the claim may be important to the public and the parties, when two of the parties happen to be states.

Even though 28 U.S.C. section 1251(a) says that "The Supreme Court shall have original and exclusive jurisdiction of: (1) all controversies between two or more states," the Supreme Court has ruled that in its discretion it may decline to exercise exclusive jurisdiction. In Texas

v. New Mexico, 462 U.S. 554, (1983), Justice Brennan recognized this discretionary power:

> "In recent years, we have consistently interpreted 28 U.S.C. Section 1251(a) (28 U.S.C.S. Section 1251(a)) as providing us with substantial discretion to make case- by-case judgments as to practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." Id. at 570.

The attempt by Congress to define the original and exclusive jurisdiction of the United States Supreme Court by statute is contrary to the Constitution. U.S. Const. Art. III, sec. 2, Cl. 2 provides:

> In all Cases affecting Ambassadors, other public Ministers and Counsuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other

> Cases before mentioned, the supreme Court shall have appellate Jurisdiction both as to law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The exceptions clause of Article III, Sec. 2, Cl. 2 only applies to the Supreme Court's appellate jurisdiction. It does not apply to the Court's original jurisdiction. A lack of Congressional power to alter the Court's original jurisdiction is explained in Bator, Hart & Wechsler's The Federal Court's and the Federal System, 242 (1973):

> "The Constitution specifically defines the original jurisdiction, and the Supreme Court has repeatedly said that it can be exercised without further enabling action by Congress. See, eg., Kentucky v. Dennison, 24 How. 66,86 U.S. 1861. Presumably this means that Congress has no power to

> contract the jurisdiction any more than to enlarge it."

Therefore, any attempt by Congress to designate certain areas as under the original and "exclusive" jurisdiction of the U.S. Supreme Court goes beyond the power of Congress, and the Supreme Court has the power to determine the meaning of the grant of original jurisdiction under the Constitution. As Justice Brennan's opinion in Texas v. New Mexico, supra, demonstrates, the Court still considers the question of original jurisdiction to be discretionary, despite the statute.

That issues relating to disputes between states may be litigated in a forum other than the Supreme Court is demonstrated by Arizona v. New Mexico, 425 U.S. 795 (1976). When that action was filed in the U.S. Supreme Court,

there was a suit pending in the state courts of New Mexico to determine the constitutionality of New Mexico's electrical energy tax, which was imposed on certain Arizona utilities. The suit was filed by several Arizona utilities. Maryland v. Louisiana, 451 U.S. 725 (1981) explains that one of the utilities was a political subdivision of the State of Arizona. While the suit was pending in the state courts, Arizona filed a motion for leave to file a complaint against New Mexico in the United States Supreme Court. Arizona's motion was denied for the following reasons:

> "In the circumstances of this case, we are persuaded that the pending State court action provides an appropriate forum in which the issues tendered here may be litigated. If on appeal the New Mexico Supreme Court

> should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal ..." 425 U.S. at 797 (emphasis in original).

Cissna v. Tennessee, 245 U.S. 289 (1917) also demonstrates that state courts can determine issues that relate to disputes between states. In Cissna, the state courts of Tennessee passed on the issue of the boundary between Tennessee and Arkansas and the sovereignty of the State of Tennessee over certain lands in the Mississippi River in a law suit in which Tennessee claimed ownership over certain "dry lands formerly a part of the bed of the Mississippi River which lay between low-water marks on the Tennessee side and the middle of the River as it

flowed prior to the change in the channel made in the year 1876 ..." Id. at 290. The U.S. Supreme Court noted that it had jurisdiction because the State court had come "to an erroneous conclusion upon the merits of the question of the proper location of that boundary." Id. at 293. There was no suggestion in the Supreme Court opinion that the State courts of Tennessee did not have jurisdiction to rule on this question. Instead the Supreme Court reviewed and reversed on the merits.

The Arizona v. New Mexico and Cissna v. Tennessee decisions establish that plaintiffs in the case at bar should be permitted to raise issues that concern the two defendant states in a state court forum. This is true even when the issue concerns an

attribute of sovereignty, e.g., taxing powers.

Cases relied upon by the trial court, Durfee v. Duke, 375 U.S. 106 (1963) and Hilderlider v. LaPlata River and Cherry Creek Ditch Co., 304 U.S. 92 (1937), stand for the proposition that issues concerning boundaries litigated in state courts by private parties only, are not binding on the States, who were not party to those cases. At bar, both of the States concerned are parties. Therefore, there is no basis for precluding review of the issues by state courts and to have determinations binding on all parties to the suit.

The state courts of New Jersey are a proper forum to raise the issues and

to litigate those issues. The wrongful taxation is occurring on Liberty and Ellis islands, which petitioners contend lie within the sovereign territory of New Jersey. Petitioners have tangible rights which can be litigated in the state court. The lower court's dismissal of this lawsuit on the ground of excluswive U.S. Supreme Court jurisdiction was erroneous. This Court should grant the petition because the states have failed to act and the issues raised herein define the jurisdictional basis for citizens and taxpayers to enforce the rights of sovereignty in their state courts.

POINT II

THERE IS NO FEDERAL CONSTITUTIONAL PRINCIPLE THAT PREVENTS CITIZENS OF ONE STATE FROM SUING ANOTHER STATE WITHIN THE STATE COURTS.

New York is not entitled to any sovereign immunity for its extra territorial ultra vires acts that take place within New Jersey. When a state engages in activities in another state, that first state is not properly exercising its sovereign powers over the citizens of the state into which it has entered. Therefore, it is not entitled to the protection of sovereign immunity. See Georgia v. City of Chattanooga, 264 U.S. 472, (1924); Harris v. City of Chattanooga, 507 F.Supp. 374 (N.D. Ga. 1980); Cincinnati v. Commonwealth, 292 Ky. 597, 167 S.W.

3d 709 (1942); State v. City of Hudson, 231 Minn. 127, 42 N.W. 2d 546,548 (1950); Anderson v. City of Madison, 444 S.W. 2d 443 (Mo. 1969). Specifically, this sovereign immunity has been held to be inapplicable when property rights and duties in the forum state are concerned. People v. Streeper, 121 Ill. 2d 204, 145 N.E. 2d 625 (1957); State v. Holcomb, 85 Kan. 178, 116 P. 251 (1911).

There can be no doubt that under the allegations of the complaint, the activities of New York on Ellis and Liberty Islands are extra- territorial in nature, and therefore are not entitled to the protection of sovereign immunity. New York has entered upon the sovereign territory of New Jersey and has engaged in taxing activity, a

key attribute of sovereignty. Under this circumstance, suit is properly brought in the state in which the res is located and the state in which the wrongful taxing activity is taking place. Of course for the court to make a final determination as to whether or not New York is acting beyond its territorial borders, the court must reach the merits of the claim. However, a court always has jurisdiction to determine its own jurisdiction. Lambert v. Conrad, 536 F. 2d 1183 (7th Cir. 1976); see also Wright & Miller, 13A Federal Practice and Procedure, section 3536 (1984).

The lower court, relying on Nevada v. Hall, 440 U.S. 410 (1979) failed to recognize that there is no bar to a suit against a state, in this case New

York, in the state courts of another sovereign, i.e., New Jersey. Nevada v. Hall discussed sovereign immunity and reached the following conclusion:

> "This explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts ... But if a federal court were to hold, by inference from the structure from our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the State -- and the power of the people -- in our Union". 440 U.S. at 416 and 426-427 (emphasis added).

The case at bar does not present a situation where there are different state policies that would produce different remedies. There is no conflict in the laws of the two states.

Instead there is a single compact and therefore a single policy that purportedly governs the rights of both states. The exercise of jurisdiction over New York by the courts of New Jersey does not present a conflict in state laws anticipated by footnote 24 in Nevada v. Hall, 440 U.S. at 424, n.24. Furthermore, there is no interference with New York's sovereign responsibilities, because New York is not the true sovereign over these islands. The lower court's decision to immunize New York from suit in New Jersey courts was in error. The petition should be granted so that the constitutional limitations, if any, imposed by Nevada v. Hall, can be fully defined.

POINT III

TAXPAYERS AND CITIZENS OF ONE STATE HAVE THE STANDING TO CHALLENGE THE EXTRA-TERRITORIAL UNCONSTITUTIONAL ACTIVITIES OF A SISTER STATE WITHIN THEIR STATE, PARTICULARLY A TAXPAYER WHO HAS BEEN FORCED TO PAY A SALES TAX TO THE INVADING SOVEREIGN.

New York's taxing activity on Ellis and Liberty Islands is in direct violation of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because one state may not tax sales transactions in another state. McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954). Since New Jersey is sovereign over the two islands pursuant to the 1834 Compact, New York is illegally imposing a sales tax on merchandise

bought and sold within the sovereign territory of New Jersey.

State courts have the power to decide issues of extra territorial taxation by one State within the sovereign territory of another State. Curry v. McCanless, 307 U.S. 357 (1938) is a direct example of Supreme Court review of such issues raised and litigated before the state courts of Tennessee wherein the tax commissioner of the State of Alabama was a party.

Persons, who have had a tax extracted contrary to the U.S. Constitution, have been held to have standing under the more strenuous case or controversy test applicable to the federal courts. Challenge by a taxpayer to the collection of a tax clearly establishes a case or

controversy; it is only the circumstance of an attack on a spending program (not an issue at bar) where standing becomes difficult to establish. See United States v. Butler, 297 U.S. 1,58 (1935); Nashville, Chattanooga & St. Louis Railway v. Wallace, 288 U.S. 249, 260-262 (1933); Tribe, American Constitutional Law, sec. 3-19, p. 83 (1978).

Petitioner Nidia Davila Colon paid the sales tax on purchases made on Liberty Island. Taxation of sales transactions by New York on the two islands is an unconstitutional exercise of authority by that state. To deny petitioner Colon standing under this circumstance is not only a blatantly incorrect application of the law of

standing, but it precludes review of a substantial constitutional question that is raised by New York's taxing activity on the two islands.

Standing is present in the case at bar. Therefore, the determination of the lower court should be reversed.

POINT IV

THE LOWER COURT'S RULING THAT THE LAW SUIT IS BARRED BY THE DOCTRINE OF COMITY IS SO INTERTWINED WITH FEDERAL ISSUES THAT IT IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND FOR DISMISSING THE SUIT.

The Supreme Court may not review a decision of the State Court if that decision rests upon adequate and independent State grounds. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). The Supreme Court makes its

own determination as to the ground on which the judgment rests. Black v. Cutter Laboratories, 351 U.S. 292,298 (1956). In making this determination the Court considers whether the judgment based upon a State ground is independent of the federal question and whether the determination on the state issue is adequate to support the judgment.

In the case at bar, the trial court determined that petitioners could not seek relief in this law suit on the ground of comity. However, the trial court's determination was so intertwined with federal principles of sovereign immunity that the determination on the ground of comity is not adequate and independent.

In rejecting petitioners' law suit

on the ground of comity, the trial court conducted the following analysis:

> "This Court is satisfied that permitting this action would violate principles of comity between States fundamental to our federal system. The fifty United States are part of the Great Union. Disputes between the States over territory and the exercise of governmental authority over that territory, should be heard in the supreme judicial body of that great nation, the United States Supreme Court. Hearing such disputes in the courts of one of the States involved would give the appearance if not the fact of latent partisanship.
>
> The Doctrine of Comity between the States of the United States is rooted in the federal principle that the States must accommodate their diverse concerns and must work together within the Union to foster their common interests. Contests in State courts over territory would produce discord and ill feeling, not amity and comity.
>
> As previously stated in opinion, upholding suits of

> this kind would likely result in a multitude of cacaphonious litigation. Citizens of various states would seek to vindicate in their State courts the perception of those citizens of the territorial and jurisdictional rights or wrongs of their states, vis a vis neighboring states. The resulting chaos and confusion would service no one's best interest.
>
> This case is an excellent example of the need for and the wisdom of the Doctrine of Comity" pp 40a to 42a, infra.

The trial court was declining to exercise jurisdiction on the federal principle that there must be accommodation between the states. As demonstrated in Nevada v. Hall, supra, there is no such federal principle that would bar this law suit. Second, and even more important, is the trial court's decision to exercise comity because the matter should be heard by

the United States Supreme Court. The trial court was laboring under the misconception that the United States Supreme Court has exclusive original jurisdiction over this law suit and that State courts cannot hear such controversies. As argued in Point I, supra, such is not the case.

The trial court's decision is not a truly independent State ground because it relies upon federal concepts, i.e., original exclusive U.S. Supreme Court jurisdiction and because comity is based upon the federal principle that States should not have to answer for their wrongs in the State courts of a sister State. If this Court were to determine that there is no principle of sovereign immunity that bars the law suit, the trial court

would have to reevaluate and reassess its decision on the basis of comity since that decision was grounded in what was a further application of the trial court's view of the doctrine of sovereign immunity.

It is respectfully submitted that the issue of comity is not an independent State ground. The reversal of the lower court's decision on the issues of the exclusive jurisdiction of the U.S. Supreme Court and sovereign immunity would mandate a reassessment of the decision to dismiss on the ground of comity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

MARGULIES, WIND, HERRINGTON
& KATZ
Attorneys for Petitioners



By: Robert E. Margulies

Of Counsel:
Maurice C. Brigadier

On The Petition:
Clifford A. Herrington

April 23, 1987

APPENDIX

SUPREME COURT OF NEW JERSEY
C-479 SEPTEMBER TERM 1986

Filed Supreme Court
January 26, 1987
Stephen W. Townsend,
Clerk

FRANK J. GUARINI, etc. et al:		
Plaintiffs-Petitioners,	:	
and	:	
ROBERT J. DEL TUFO et al.,	:	ON PETITION FOR CERTIFICATION
Plaintiffs,	:	
vs.	:	
THE STATE OF NEW YORK, et al:		
Defendants-Respondents	:	

To the Appellate Division, Superior Court

A petition for certification of the judgment in A-4000-85T5 having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R. 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice at Trenton, this 21st day of January, 1987.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

I hereby certify that the
following is a true copy
of the original on file in
my office

/s/ Stephen W. Townsend
Clerk of the Supreme
Court of New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4000-85T5

FRANK J. GUARINI, Member of the House of Representatives, GERALD MC CANN, Mayor of the City of Jersey city, DR. IRWIN SILVERMAN, DR. LENA EDWARDS, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN and WALTER IRWIN,

Plaintiffs-Appellants,

and

ROBERT J. DEL TUFO, REV. RAYMOND J. KUPKE and DR. SANG JIN KIM,

Plaintiffs,

v.

THE STATE OF NEW YORK and THE STATE OF NEW JERSEY,

Defendants-Respondents.

Argued September 23, 1986- Decided Oct. 16, 1986 Amended Opinion - November 21, 1986

Before Judges Michels, O'Brien and Skillman On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County.

Seymour Margulies argued the cause for appellants (Margulies, Margulies &

Wind, attorneys; Mr. Margulies and Maurice C. Brigadier, of counsel; Clifford A. Herrington, on the brief).

Ellen Fried, Assistant Attorney General of the State of New York, argued the cause for respondent State of New York (Clemente, Strenk & Kierman, attorneys; Robert Abrams, Attorney General of the State of New York, of counsel; Judith T. Kramer, Ms. Fried and Jeffrey P. Clemente, on the brief).

Dorothy J. Donnelly, Deputy Attorney General, argued the cause for respondent The State of New Jersey (W. Cary Edwards, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Ms. Donnelly, on the brief).

PER CURIAM.

Plaintiffs Frank J. Guarini, a member of the House of Representatives, Gerald McCann, the Mayor of the City of Jersey City, Dr. Irwin Silverman, Dr. Lena Edwards, John M. Stiles, Nidia Davila Colon, Harry Bisharian and Walter Irwin appeal from a judgment of the Chancery Division that dismissed their declaratory judgment action

against defendants The State of New York and the State of New Jersey. Plaintiffs sought (1) a declaration that the 1834 compact between the States of New York and New Jersey, which established the boundaries between these two states and which was approved by Congress, did not confer jurisdiction or sovereignty over Ellis' Island and Bedloe's (now Liberty) Island to New York; (2) an injunction against New York from collecting or levying taxes on those islands or exercising sovereignty or jurisdiction including police power over or with respect to New York, and (3) the imposition of a constructive trust on past tax revenues collected on the islands by New York. The trial court dismissed the action generally on the following grounds: (1) the Superior

Court of New Jersey lacked jurisdiction over the subject matter because the Supreme Court of the United States has original and exclusive jurisdiction over such boundary disputes and cases involving interpretation of interstate compacts establishing boundaries; (2) plaintiffs lacked the requisite standing to institute an action asserting rights or claims which are the prerogative of the sovereign states, (3) the action was barred by principles of comity and (4) the action was barred by sovereign immunity.

We are satisfied from our study of the record and the arguments presented that the trial court properly dismissed this action. We therefore affirm the judgment under review substantially for the reasons expressed by Judge

Humphreys in his thorough and thoughtful oral opinion of March 18, 1986, as edited by his written opinion dated March 18, 1986 reported in Guarini v. State of New York _____ N.J. Super. ____ (Ch. Div.1986).[1]

Affirmed.

---

1. Our affirmance of the judgment under review is without prejudice to the right of plaintiff Nidia Davila Colon to seek refund of the $1.35 sales tax paid to The State of New York or the City of New York, as the case may be, in connection with the purchase of items from the concession at Liberty Island in the appropriate New York court. This issue was not specifically raised before or decided by the trial court and counsel for the State of New York have recognized plaintiff-Colon's right as an individual to seek such refund. See Hill v. Joseph, 205 Misc. 441, 129 N.Y.S. 2d 348 (Sup. Ct., Special Term 1954).

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-HUDSON COUNTY
DOCKET NO. C-4776-84

FRANK J. GUARINI, Member of the House of Representatives, et al.,

Plaintiffs,

vs.

THE STATE OF NEW YORK and THE STATE OF NEW JERSEY,

Defendants.

Civil Action

OPINION

Decided: March 18, 1986

Seymour Margulies, Esq. Clifford Herrington, Esq. (of counsel) appearing for plaintiff.

Robert Abrams, Attorney General of the State of New York Judith T. Kramer, Assistant Attorney General Ellen Fried, Assistant Attorney General, appearing for defendant State of New York. Jeffrey P. Clemente, Esq. (Local counsel) appearing for defendant State of New York.

W. Cary Edwards, Attorney General of the State of New Jersey Dorothy Donnelly, Deputy Attorney General, appearing for defendant State of New Jersey.

HUMPHREYS, A.J.S.C.

The controversy in this case centers around the Statue of Liberty and the rights and interests of New Jersey and New York to the statue and the land on which the statue rests.[1]

The Statue of Liberty is one of America's most treasured possessions. Its timeless message of hope and promise has found fulfillment in the lives of millions of immigrants and their descendants. The Statue is truly an eternal symbol of the essence of America. The statue lies on an island in the Hudson River, the border between New Jersey and New York. The island and an adjoining island are on the New Jersey side of the river; however, the State of New York pursuant to an Interstate Compact with New Jersey has exercised jurisdiction over the two

[1]This is a refinement of an oral opinion.

islands and the statue for at least 150 years.

Plaintiffs are public officials and prominent citizens who are residents of New Jersey. They contend that since the islands are located in the New Jersey portion of the Hudson River, this Court -should declare that the islands and the statue are under the jurisdiction and sovereignty of New Jersey State Government.

The State of New York moves to dismiss this action asserting various defenses, the most significant of which are: (1) Lack of jurisdiction in this Court; (2) Sovereign immunity of New York from suit; (3) The doctrine of comity between states; and (4) Plaintiffs' lack of standing.

Plaintiffs cross-move for partial summary judgment.

The Court, after a careful examination of the facts and the legal authorities concludes that New York's above defenses are valid and bar this action.

I. JURISDICTION

In 1833 New Jersey and New York entered into an Interstate Compact concerning the Hudson River. The compact was approved by the United States Congress in 1834 and, therefore, became binding upon New Jersey and New York. Poole v. Fleeger, 36 U.S. 184 (1837).

Under the terms of the compact the boundary between New Jersey and New

York is established, with some exceptions, as the middle of the Hudson River. The two islands in question are in the New Jersey half of the river and, therefore, within the territory of New Jersey. The compact, however, expressly provides that New York will retain "present jurisdiction" over the islands, and New York has continued to exercise that jurisdiction to the present day.

Plaintiffs contend that this Court should declare the compact void and ultra vires, or should modify the compact so as to give New Jersey State Government jurisdiction over the islands and the statue. Plaintiffs also allege that the islands have been enlarged through accretion of soil and that this additional area should be

administered by New Jersey State Government. Plaintiffs in their cross-motion for partial summary judgment seek a declaration by this Court that the islands are "a part of the sovereign territory of New Jersey."

Viewed precisely, this case involves either (1) a border dispute; or (2) an abrogation or modification of an interstate compact; or (3) a declaration of the rights of the party states under that compact. In all of these instances, this Court lacks jurisdiction.

If this case is viewed as a border dispute between states, then the proper forum is the United States Supreme Court. Congress has provided that the United States Supreme Court "shall have original and exclusive jurisdiction of

(1) all controversies between two or more states". 28 U.S.C.A. section 1251(a)(1). See also U.S. Const., Art.III, Sec. 2, and Ohio v. Kentucky, 410 U.S. 641, 644 (1973).

Notwithstanding the above statutory language of "exlcusive jurisdiction", the United States Supreme Court has deferred to other forums in "appropriate" cases, i.e. "where there is jurisdiction over the named parties, where the issues tendered may be litigated and where appropriate relief may be had." Illinois v. Milwaukee, 406 U.S. 91, 93 (1972), Maryland v. Louisiana, 451 U.S. 725, 739 (1981), and Texas v. New Mexico, 462 U.S. 554, 570 (1983). Under that criteria, this case and this forum are plainly

not "appropriate". On the contrary, the issues here present a classic case for the exercise of original and exclusive jurisdiction by the United States Supreme Court. The issues do not arise in the context of a suit by private parties over private property, in which the forum might appropriately be a state court. See Durfee v. Duke, 375 U.S. 106, 115-116 (1963). The United States is not a party and, therefore, the discretionary jurisdictional language of paragraph (b) of the Code is not implicated. See 28 U.S.C.A. section 1251(b). Here we deal with a dispute over state boundaries, over an interstate compact, over jurisdiction and sovereignty under that compact. Such an action patently lies only in the United States Supreme Court, not in the state court of one of

the states involved.

Fundamental principles of law preclude state boundaries from being affected by suits brought by individuals. Suits between private parties as to their interests in land cannot bind the states "with respect to any controversy they might have, now or in the future, as to the location of the boundaries between them, or as to their respective sovereignty over the land in question". Durfee v. Duke, supra.

No court, and certainly no state court, has the power to abrogate or modify interstate compacts approved by Congress. See Texas v. New Mexico, supra at 564. No state court has the authority to declare the rights and interests of states over disputed

territory especially when the the dispute has apparently been resolved by an interstate compact. On the contrary, the cases suggest that it is only the United States Supreme Court that has that authority. In Texas v. New Mexico, supra at 567, the Court pointed out that the authority of the United States Supreme Court to resolve controversies between two states "...extends to a suit by one state to enforce its compact with another state or to declare rights under a compact...If there is a compact, it is a law of the United States...and our first and last order of business is interpreting the compact". See also Durfee v. Duke, supra at 110.

Plaintiffs cannot, therefore, through the medium of a lawsuit in a

state court oust or curtail another state's exercise of jurisdiction over land, particularly when that jurisdiction is being exercised pursuant to the express terms of an interstate compact, a "law of the United States". This can be done, if at all, only through an action filed in the United States Supreme Court by a state which is a party to the compact. See Ohio v. Kentucky, supra at 648; Texas v. New Mexico, supra at 570.

II.

SOVEREIGN IMMUNITY

Plaintiffs assert that the doctrine of sovereign immunity has had its day and should not be applied here.

The immunity of the sovereign from suit springs from the inability at

common law to sue the king in his own court without his consent. The king was at the zenith of the feudal hierarchy. He was not subject to suit elsewhere since there was no court higher than his own. See F. Pollock & F. Maitland, History of English Law, 518 (2nd 1899). Much misconstrued is the phrase "A king can do no wrong". As the Magna Carta shows, a king is capable of and may, indeed, tend toward doing wrong. See also William Shakespeare, King Richard the 3rd.

Procedures were, therefore, developed in England to redress the king's wrong and to secure a government under law. This was frequently done by the petition of right which the king could not rightfully refuse. See Crosswhite, "Comity Bows to Wall

Street: Ehrlich-Bober v. University of Houston," 14 Conn. L.Rev. 369, 373 n. 27 (1983). In practice, "the king often endorsed on such petitions let justice be done" which empowered the courts to proceed. Case Comment, "Eleventh Amendment Does Not Preclude Suit Against One State In the Courts of A Sister State: Nevada v. Hall," 440 U.S. 410 (1979), 58 Wash. U.L.Q. 481, 482 (1980).

Notwithstanding these modifications in England, the doctrine of sovereign immunity took firm root in this country, and the states of this union have applied the doctrine in various contexts. However, even in the United States, sovereign immunity has probably never been applied in its "literal breadth". East Orange

v. Palmer, 47 N.J. 307, 328 (1966). Moreover, in recent years it has lost some force. See Willis v. Dept. of Cons. & Ec. Dev., 55 N.J. 534 (1970); P.T. & L. Construction Co. v. Comm'r. Dept. of Trans., 55 N.J. 341 (1970).

Nevertheless, both New York and New Jersey generally retain the doctrine. See The New Jersey Torts Claims Act at N.J.S.A. 59:1-1 et seq. and N.J.S.A. 59:2. The purpose of the New Jersey statute is to "re-establish" sovereign immunity. English v. Newark Housing Authority, 138 N.J. Super. 425, 428 (App. Div. 1976). See Glen v. Rockefeller, 307 N.Y.S. 2d 46, (Sup. Ct. 1970), aff'd 313 N.Y.S. 2d 938 (App. Div. 1970). Compare Cass v. State, 448 N.E. 2d 786,

(Ct. App. 1983).

Plaintiffs do not claim that this is a case in which sovereign immunity has been specifically waived by legislation. Moreover, plaintiffs do not dispute that a State may assert its sovereign immunity in its own courts. Plaintiffs' position is that the U.S. Supreme Court in Nevada v. Hall, supra, determined that a state may not assert its sovereign immunity in the courts of another state. In that case plaintiff was a California resident. He instituted suit in California to recover for a severe injury sustained in an automobile accident in California. The defendant was an employee of a Nevada State entity which owned the car which struck plaintiff. Nevada asserted sovereign immunity as a

defense to the California suit. The California courts held in favor of the plaintiff resulting in judgment for the plaintiff in excess of one million dollars.

The United States Supreme Court held that under the circumstances there, Nevada's sovereign immunity did not protect it from suit in a California State Court. The Court's rationale was based on the theory that the Federal Constitution did not prevent California from permitting a suit against another state to be brought in the California courts.

The Court in Nevada v. Hall, supra, recognized tht its ruling did not mean that a state could be sued in another state as a matter of course. The Court said:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result. (440 U.S. 424 n. 24).

The present case clearly requires a "different analysis" and a "different result". Plaintiffs in this case have no property rights or interests in the islands or in the statue. Their personal rights are indistinguishable from those of other New Jersey residents. Plaintiffs are challenging in a suit in New Jersey the authority of New York State over land bordering the two states. Plaintiffs, if

successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 Compact. Exercise of jurisdiction by this Court would thereby pose a "substantial threat to our constitutional system of cooperative federalism". Id.

Morever, if this suit were allowed to stand, Pandora's box would surely be opened. The escaping furies would spawn a cascade of law suits as citizens challenged the governmental authority of neighboring states over lands on their borders. New Jersey borders three states and is no stranger to boundary disputes. See New Jersey v. Delaware, 291 U.S. 361 (1934); Central R.R. Co. v. Jersey City, 209

U.S. 473 (1908). Suits almost without number would likely be brought in New Jersey by its citizens, as well as by Pennsylvania, Delaware and New York citizens in their state courts. The governments of those states would find themselves unwillingly embroiled in a plethora of litigation over boundary and jurisdictional issues, many of which could and should be resolved by the states through negotiations not litigation.

Furthermore, allowing this suit is out of step with the history of our nation, as well as basic tenets of our federal system. Our founding fathers were opposed to permitting citizens from one state to sue another state. See Nevada v. Hall, supra at 435-436, (Rehnquist, J. dissenting).

In 1793, the United States Supreme Court permitted such a suit in Chisholm v. Georgia, 2 Dall, 419, 1 L. Ed. 440 (1793). That decision was promptly overturned by the adoption of the Eleventh Amendment. That Amendment by its terms deprives only the federal courts of jurisdiction over cases in which citizens of one state sue another state. However, "...the States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual states as unconsenting defendants in foreign jurisdictions". Nevada v. Hall, supra at 437. (Rehnquist, J., dissenting). It would make no sense for the states to foreclose "the neutral federal forums only to be left to defend suits in the courts of other States". Id.

The majority in Nevada v. Hall, supra, may have opened the door somewhat to suits against a state by residents of another state in the courts of that latter state. Plaintiffs, however, would fling the door wide open. Even the majority in Nevada v. Hall would not sanction such an expansion, especially where at issue is the governmental authority of the state being sued. Id.

Plaintiffs contend that sovereign immunity does not apply to activities of New York which take place in New Jersey territory. That argument, however, is unsupported by persuasive authority. This is not an in rem or quasi in rem action in which plaintiffs are asserting property rights in real or personal property located in New

Jersey. New York's "activities" in New Jersey in this case are not as a trespasser or interloper; New York is acting pursuant to the express terms of an interstate compact, which is the equivalent of a law of the United States. See Texas v. New Mexico, supra at 567. Any challenge to New York's authority to so act requires a declaration of rights under the compact. Such a declaration must be sought in the United States Supreme court. See Ohio v. Kentucky, supra; Texas v. New Mexico, supra at 554, and Point I of this opinion.

Plaintiffs also contend that New York will not in its own courts recognize sovereign immunity for another state; hence, New Jersey should do the same. Plaintiffs rely on the

case of Ehrlich-Bober & Co., Inc. v. University of Houston, 49 N.Y. 2d 574, 404 N.E. 2d 726, 427 N.Y.S. 2d, 604 (Ct. App. 1980). In that case a New York company had commercial dealings with the University of Houston, an entity of the State of Texas. Tne New York company instituted suit against the University of Houston in the New York courts. The New York Court of Appeals held that New York's public policy required the New York courts to permit suits by New York companies in New York courts against other states or other state entities in cases arising out of "a wholly commercial transaction centered in New York". Id. at 532.

Here, however, we are dealing with a governmental function, not a

commercial transaction. Moreover, New Jersey's public policy does not require this suit to be brought. See Point III of this opinion.

Turn this case around. Nothing in Ehrlich-Bober, supra indicates that New York would permit in its courts a suit by New York citizens challenging New Jersey's long-standing governmental authority over territory in New York when New Jersey had been exercising that authority for more than a century pursuant to an interstate compact to which New York was a party. In fact, a contrary conclusion was reached in the case of The People v. The Central R.R. Co. of New Jersey, 42 N.Y. 283 (1870). In that case the New York Court found that New Jersey had jurisdiction over certain piers, wharfs, docks and other

improvements in the Hudson River pursuant to the 1833 Compact. The Court said that under those circumstances the New York courts did not have and should not take jurisdiction with respect to those improvements. The Court said that the exercise of such jurisdiction by New York would be "entirely untenable and in conflict with the fundamental principle of law and justice, that no party shall be a judge in his own cause". Id. at 305. That holding and language is squarely applicable here.

This action is barred by the doctrine of sovereign immunity. Residents of New Jersey are attempting here to challenge the governmental authority of New York over territory which by interstate compact is under

New York's jurisdiction. Permitting this suit would violate principles of cooperate federalism and interfere with New York's exercise of sovereign responsibilities pursuant to that interstate compact. Nevada v. Hall, supra at 424 n.24; see also Id. at 432 (Rehnquist, J., dissenting); Id. at 427 (Blackmun, J., dissenting).

III.

COMITY

The majority of the United States Supreme Court in Nevada v. Hall, supra, concluded that the United States Constitution would not bar all suits against states instituted by the citizens of another state in the courts of that latter state. The Court in Nevada v. Hall, however, did not rule

on whether in a given case a state court could or should decline to entertain the suit on the ground of comity.

The doctrine of comity has been described as:

> ...neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. (Hilton v. Guyot, 159 U.S. 113, 163-164 (1895)).

Chief Justice Taney of the United States Supreme Court stated in Bank of Augusta v. Earle, 38 U.S. 517, 590 (1839), that there should be a greater degree of comity among the states than

among foreign nations. The states, the Chief Justice said, are "members of the same great political family" and have "deep and vital interests" which bind them "so closely together."

Our New Jersey Supreme Court has stated that:

> ...comity is not a binding obligation on the forum state, but a courtesy voluntarily extended to another state for reasons of 'practice, convenience and expediency...Deference is not offered, however, when it would contravene the public or judicial policy of the forum state. Thus, application of comity involves an examination by the Court of both the public policy of the forum state and the impact on that policy of enforcing the foreign proceeding. (Philadelphia v. Austin, 86 N.J. 55, 64 (1981)).

The plaintiffs contend that comity should not be applied here. They again

rely on Ehrlich-Bober, supra. That case, as previously stated, involved a "wholly commercial transaction" centered in New York. It was for that reason that the majority declined to permit the assertion of "governmental immunity as a matter of comity". Ehrlich-Bober is not applicable since this case does not involve a commercial transaction. On the contrary, the question here "goes to the very heart of the governmental function" and, therefore, the doctrine of comity requires dismissal. See Ehrlich-Bober, supra at 580-581 in which the Court implied that comity should bar the action when the question at issue goes to the very heart of the governmental function.

The "public" or "judicial policy"

of New Jersey would not be "contravened" by declining to hear this suit. See Philadelphia v. Austin, supra at 64. The State of New Jersey has made no such argument to this Court. On the contrary, New Jersey in its answer demanded the dismissal of this action and asserted various defenses to the suit as follows:

> First Defense. Complaint raises a boundary dispute and a dispute as to the respective sovereignty of Defendants, the State of New York and State of New Jersey, and jurisdiction properly lies in the United States Supreme Court;
>
> Second Defense. The complaint failed to state a cause of action upon which relief may be granted;
>
> Third Defense. This action is barred by the 11th Amendment of the United States Constitution;
>
> Fourth Defense. Plaintiffs lack standing to raise the

issues specified in their complaint.

Moreoever, New Jersey in its answer "demands judgment dismissing the complaint together with costs of suit and such other relief as the Court deems just and proper."

New Jersey has not amended its answer. Hence, the answer stands as an expression of New Jersey's formal position in this lawsuit.

In a letter brief, New Jersey attempts to shift position. New Jersey Contends in that brief that the motion of New York for dismissal should be denied "since jurisdiction of the res of the dispute lies within the State of New Jersey." However, New Jersey also states in its brief that it takes no position on the issue of New York's

sovereign immunity, nor does New Jersey abandon a separate defense of U.S. Supreme Court jurisdiction.

New Jersey states further in its brief (but not in any pleading or motion), that summary judgment should be granted "declaring New Jersey sovereign over the islands." New Jersey argues that the word "jurisdiction" in the 1833 Compact should be narrowly construed so as to refer only to the right to exercise legal process on the islands.

New Jersey's position was not clarified by oral argument. As best as can be gleaned, New Jersey's position is that it does not seriously object to dismissal of this suit, but if the suit is not dismissed, then New Jersey wishes to assert whatever legal rights

or remedies it may have.

In any event, the Court concludes that the State of New Jersey would not view the dismissal of this action on the ground of comity as "contravening" the "public" or "judicial policy" of New Jersey. Apparently the States of New Jersey and New York are proceeding by discussion and accommodation to resolve any differences they may have. That process is clearly preferable to litigation.

As the U.S. Supreme Court said in Texas v. New Mexico:

> Time and again we have counseled States engaged in litigation with one another before this Court that their dispute 'is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of the representatives of the states

> which are vitally interested than by proceedings in any court however constituted.' Id. at 575.

This Court concludes that permitting this action would clearly violate fundamental principles of comity between states which are fundamental to our federal system. The 50 United States are parts of a great union. Disputes between the states over territory and the exercise of governmental authority over that territory should be heard in the supreme judicial body of that great union, the United States Supreme Court. Hearing such disputes in the courts of one of the states involved would give the appearance if not the fact of blatant partisanship.

The doctrine of comity between the states of the United States is rooted

in the basic federal principle that the states of this federal union must strive to accommodate their diverse concerns and work together to foster their common interests. Contests in state courts over territory and jurisdiction over that territory would produce discord and ill feeling, not comity and amity. Upholding suits of this kind would result in a multitude of cacophonous litigation. Citizens of various states would seek to vindicate in their state courts their perception of the territorial rights or wrongs of their states vis-a-vis neighboring states. The resulting chaos and confusion would serve no one's best interests.

This case is an excellent example of the need for and the wisdom of the

doctrine of comity.

IV.

STANDING

Plaintiffs assert that they have standing to sue under the liberal standing rules in New Jersey. The New Jersey Supreme Court has held that "in cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing." Salorio v. Glaser, 82 N.J. 482, 491 (1980).

Plaintiffs contend this is a case of "great public interest" and that they meet the requirements of a "slight additional private interest." As to the private interest, one of the Plaintiffs purchased items on one of the islands and paid $1.35 sales tax to New York.

Two of the Plaintiffs contend that they have a private interest based on the potential award of labor contracts to New Jersey labor unions rather than New York labor unions, if New York is ousted from jurisdiction over the islands.

Plaintiffs "private interests" are of gossamer texture. Moreover, their interests do not impinge on the major issues in this case, whether this Court can and should declare that New York may not exercise governmental authority over the islands and the Statue pursuant to the interstate compact. As to that vital issue, Plaintiffs' interests are no more or less than any citizen of the United States, since the Statue of Liberty belongs to all of us.

Plaintiffs are challenging New

York's right to exercise governmental authority over certain territory. However, the right to fix and determine boundaries and to exercise governmental authority over that territory are basic attributes of sovereignty. Justice Story said nearly 150 years ago in Poole v. Fleeger:

> It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the

> constitution of the United States. So far from there being any pretense of such a general surrender of the right, it is expressly recognized by the constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of the congress. The constitution declares, that 'no state shall, without the consent of congress, enter into any agreement or compact with another state;' thus plainly admitting that with such consent, it might be done; and in the present instance, that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both states. Id. at 209.

See Also Hinderlider v. La Plata Co., 304 U.S. 92, 106 (1937) (Brandeis, J.).

The Compact here was entered into as a part of the general right of sovereignty, the right to govern. It is binding and conclusive on the states

and on "the citizens of both states". Hinderlider v. La Plata Co., supra at 104. See also Poole v. Fleeger, supra at 209. Individual citizens simply do not have standing to have determined by a court those matters reserved to sovereign governments.

Our courts treasure the legal rights of all of our citizens and guard zealously access to the courts to secure those rights. To that end, the Courts in New Jersey have permitted citizens to bring actions in a great variety of matters, even though the citizens' personal interest may be slight. See, e.g., Salorio v. Glaser, supra; N.J. Chamb. Commerce v. N.J. Elec. Law Enforce. Comm., 82 N.J. 57 (1980). However, our form of government is a constitutional

republic, not a pure democracy. The elected representatives of the people must govern. If state government acts constitutionally but not wisely, then the remedy of the people is at the ballot box not in a courtroom. The people cannot exercise rights of sovereignty reserved to state governments or ask a court to do so at their request. In that direction lies anarchy or judicial hegemony.

Plaintiffs in this case are thus in a real sense "strangers to the controversy" and, therefore, lack standing. See Bergen County v. Port of N.Y. Authority, et al., 32 N.J. 303, 307 (1960). Any controversy here is between the plaintiffs' duly elected government, the State of New Jersey, and the government of the State of New

York. If the two governments cannot resolve that matter amicably, then redress in the United States Supreme Court is available to those two governments. Fundamental principles of law and government plainly demonstrate plaintiffs' lack of standing to maintain this suit.

CONCLUSION

This Court lacks jurisdiction to resolve border disputes between states; or to modify or abrogate interstate compacts between states; or to declare the rights of the party states under such compacts. Exclusive jurisdiction of such actions rests in the United States Supreme Court. The doctrine of sovereign immunity bars this action. Principles of comity between states fundamental to our federal system

require that this suit be dismissed. Plaintiffs lack standing to institute suit asserting rights or claims which are the prerogatives of sovereign states.

The Statue of Liberty was a gift from the people of France to the people of the United States of America. It was not a gift to New Jersey or to New York. The statute belongs to all of us. This action is dismissed with costs.

U.S. CONSTITUTION
ART. I, SEC. 8
Cl. 1 and 3

Section 8. (1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; * * *

(3) To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.

U.S. CONSTITUTION
ART. I, SEC. 10
Cl.3

(3) No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONSTITUTION
ART. III, SEC. 2, Cl. 1 & 2

Section 2. (1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more states; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONSTITUTION
AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Sec. 1251(a)

1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

4 Stat. 708 (Ch.126)

An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18th, 1833, of the one part; and Theodore Frelinghuysen, James Parker and Lucius Q.C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be tne middle of the said river, of the Bay or New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND. Tne state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek, and of and over the lands covered by the said waters to the low-water mark on the westerly or New Jersey side thereof, subject to the following rights of property and jurisdiction of the state of New Jersey, that is to say:

(1) Tne state of New Jersey shall have the exclusive right of property in and to the land under water, lying west of the middle of the Bay of New York and west of the middle of that part of

the Hudson which lies between Manhattan island and New Jersey.

(2) The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of the said state, and of and over all vessels aground on said shore, or fastened to any such wharf or dock, except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New York, which now exist or which may hereafter be passed.

(3) The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters; provided, that the navigaiton be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill von Kull, between Staten Island and New Jersey, to the westernmost end of Shooter's island in respect to such quarantine laws and laws relating to passengers as now exist, or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes, of and over the waters of the sound from the westernmost ends of Shooter's island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New

Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten island and New Jersey, lying south of Woodbridge creek, and of and over all the waters of Raritan bay, lying westward of a line drawn from the lighthouse at Prince's bay to the mouth of Matavan creek, subject to the following rights of property and jurisdiction of the state of New York, that is to say:

(1) The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten island.

(2) The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock, except that the said vessels shall be subject to the quarantine or health laws and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

(3) The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten island and the middle of the said waters; provided, that the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH: Criminal process issued under the authority of the state of New Jersey against any person accused of an offense committed within

that state, or on board of any vessel being under the exclusive jurisdiction of that state, as aforesaid, or committed against the regulations made or to be made by that state, in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiciton of the state of New York, unless such person or property shall be on board a vessel aground upon or fastened to the shore of New York, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New

Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this sixteenth day of September, in the year of our Lord one thousand eight hundred

and thirty-three and of the independence of the United States the fifty-eighth.

B. F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q.C. ELMER.

And whereas the said agreement has been confirmed by the legislatures of the said state of New York and New Jersey, respectively, -- therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, PROVIDED, That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

APPROVED, June 28, 1834.

Supreme Court, U.S.
FILED
MAY 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1739

In The

Supreme Court of the United States

October Term, 1986

FRANK J. GUARINI, GERALD McCANN, IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, AND WALTER IRWIN,

Petitioners,

V.

THE STATE OF NEW YORK, AND THE STATE OF NEW JERSEY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW JERSEY

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QUESTION PRESENTED

Whether this Court should review a state trial court dismissal of petitioners' suit on grounds of lack of jurisdiction, lack of standing, sovereign immunity and comity, which dismissal was summarily affirmed by the intermediate appellate court and denied review by the New Jersey Supreme Court, when the nature of the original complaint sought nothing less than declarations of border jurisdiction and sovereignty binding on the two states named as defendants, which defendants have declined to litigate any such dispute existing between them.

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OPINIONS BELOW

The opinion below of the New Jersey Superior Court, Chancery Division is reported as *Guarini v. New York,* 215 *N.J. Super.* 426, 521 *A.* 2d 1362 (Ch. Div. 1986). The summary affirmance thereof by the New Jersey Superior Court, Appellate Division is reported at 215 *N.J. Super.* 293, 521 *A.* 2d 1294 (App. Div. 1986). The New Jersey Supreme Court's denial of certification and dismissal of the appeal is not yet reported but it is contained in petitioner's appendix at 1a -2a.

———o———

STATEMENT OF THE CASE

It is undisputed that Ellis and Liberty (formally Bedloe's) Islands are owned exclusively by the federal government and that the Islands are located on the New Jersey side of the New Jersey/New York border, which border was established by the 1834 Compact entered into between New Jersey and New York and approved by Congress. *N.J. Stat. Ann.* § 58:28-1 *et seq.* The underlying problem which formed the basis of plaintiffs' complaint is New York's exercise of sovereignty on Liberty Island by charging New York sales tax for souvenirs purchased thereon. The State of New Jersey although disputing New York's right to charge sales tax on the Islands has chosen not to litigate its claims of sovereignty against New York but rather the Governors of the two states have agreed to propose to their respective legislatures a bistate agreement which essentially splits all tax revenue equally between the states for the exclusive benefit of the homeless. In New

Jersey this legislation has already passed both houses and been signed into law by Governor Kean. *N.J. Stat. Ann.* § 32:32-1 *et seq.;* 1987 *N.J. Sess. Law Serv.* Chapter 57, at 102-115.

Plaintiffs as private citizens sought to litigate the sovereignty issue in a manner which would have altered, indeed voided, a bistate compact and bound both states to the adjudication. Most essential to an informed determination on this petition is a correct understanding of the complaint that was actually dismissed by the New Jersey trial court. Significantly that complaint is nowhere to be found in petitioners' appendix. It is set out in full as an appendix to this brief in opposition. (1a-10a). Petitioners now characterize their suit as essentially a taxpayer's action wherein a declaration of rights under the 1834 Compact was sought. As will be seen, this is a refinement on the tail wagging the dog epigram—it is the tail in animation with the dog nowhere in sight. It is elevation of incidental to primary. It is a misleading characterization of the suit actually attempted.

In the First Count of the complaint plaintiffs recite a history of Ellis and Liberty Islands leading up to a conclusion that the State of New York has deprived the State of New Jersey of tax revenues. "The levy and collection of these tax revenues by the defendant State of New Jersey will lessen the tax burden on plaintiffs by providing greater revenues to the State of New Jersey." (5a, ¶ 17). The First Count goes on to assert a "genuine controversy between the plaintiffs, the defendant State of New Jersey and the defendant State of New York as to the rights of the parties into and over the two parcels of property." (5a, ¶ 18). Plaintiffs assert that the 1834 Compact be-

tween New Jersey and New York did not resolve the controversy. Wherefore plaintiffs sought a declaratory judgment that the State of New York does not possess jurisdiction or sovereignty over Ellis Island, Liberty Island and their accretions but rather that sovereignty and jurisdiction are in New Jersey. Injunctive relief against New York was also requested. (6a).

In the Second Count of the complaint plaintiffs assert that the 1834 Compact, to the extent it can be interpreted as giving New York jurisdiction or sovereignty over the Islands, "is void and ultra vires the powers of the signatories." The relief sought in this count was a declaratory judgment invalidating any "purported grant of jurisdiction of sovereignty to the defendant State of New York by the compact of 1834" and declaring the State of New Jersey as the proper sovereign with jurisdiction. Injunctive relief against New York was again sought. (6a).

In the Third Count plaintiffs note that much of Ellis Island is landfill and sought a declaratory judgment that "accretions and fill to Ellis Island are within the exclusive jurisdiction and sovereignty of the defendant State of New Jersey." Injunctive relief against New York was sought. (7a).

In the Fourth Count is the assertion that a specific individual (Colon) paid $1.35 in taxes to New York for the purchase of various Liberty Island souvenirs. The relief sought, however, is somewhat broader than a return of the $1.35, indeed such relief is nowhere requested. Rather what is sought is a declaratory judgment, "that the defendant the State of New York does not possess jurisdiction or sovereignty over Ellis Island and Liberty Island. . . ." (7a-8a).

In the Fifth Count plaintiffs posit that the State of New York will be unjustly enriched if it is permitted to retain the tax revenues collected on the Islands and therefore a constructive trust should be imposed and future tax collections enjoined. (8a-9a).

The Sixth (and last) Count of the complaint asserts that certain plaintiffs are New Jersey union members who have lost and will continue to lose job opportunities on the Islands because work has been going to New York unions. The final relief demanded is a declaratory judgment that New York does not possess jurisdiction or sovereignty over Ellis and Liberty Islands and that sovereignty and jurisdiction are held by the defendant State of New Jersey. (9a-10a).

The answers to the complaint (11a-24a) highlighted the border dispute existing between New York and New Jersey as well as New Jersey's areas of difference with the plaintiffs. New Jersey denied plaintiffs' allegation that the 1834 Compact did not resolve the historical dispute over the Islands. While admitting its sovereignty over the Islands New Jersey denied plaintiffs' claim that the 1834 Compact was *ultra vires*. New Jersey agreed with the contention that New York was wrongfully exercising its taxing power on the Islands. For its part, New York agreed with New Jersey that the Compact was not *ultra vires* but denied New Jersey's sovereignty while asserting its own. It denied any wrongful taxing. By way of affirmative defenses New Jersey asserted plaintiffs' lacked standing and the New Jersey trial court lacked jurisdiction. New York raised the same defenses and also asserted it was not amenable to suit by virtue of sovereign immunity and comity.

In light of the complaint filed by plaintiffs it is not surprising that the New Jersey trial judge said, "viewed precisely, this case involves either (1) a border dispute or (2) an abrogation or modification of an interstate compact or (3) a declaration of the rights of the party states under the compact." (Pet. 13a). The trial court's conclusion that the issues present, "a classic case for the exercise of original and exclusive jurisdiction of the United States Supreme Court" (Pet. 15a) cannot be seriously disputed.

The complaint was dismissed because the New Jersey Superior Court has no jurisdiction to resolve border disputes between states or to declare the rights of party states under such Compacts. Plaintiffs lacked standing to assert rights or claims which are the prerogatives of sovereign states. Further it was found that the doctrine of sovereign immunity and principles of comity between states, required dismissal of the action.

In the Appellate Division of Superior Court the trial judge's decision was summarily affirmed. (Pet. 3a-7a). In a footnote the Appellate Division added

> Our affirmance of the judgment under review is without prejudice to the right of plaintiff Nidia Davila Colon to seek refund of the $1.35 sales tax paid to the State of New York or the City of New York, as the case may be, in connection with the purchase of items from the concession at Liberty Island in the appropriate New York Court. This issue was not specifically raised before or decided by the trial court and council for the State of New York have recognized plaintiff-Colon's right as an individual to seek such refund. *See Hill v. Joseph,* 205 *Misc.* 441, 129 *N.Y.S.*2d 348 (Supp Ct., special term 1954). [Pet. 7a].

The New Jersey Supreme Court subsequently denied plaintiffs' petition for certification and dismissed the appeal. (Pet. 1a-2a).

———o———

REASONS FOR DENYING THE WRIT

The Writ sought here should be denied because the state courts correctly interpreted and applied the precedents of this Court in light of the plaintiffs' complaint. The judgment issued on separate grounds, each of which supports the result reached and some of which turn primarily, if not exclusively, on state law. *Certiorari* review is not warranted because the constitutional issues raised are frivolous.

A. The Courts Below Correctly Determined That Jurisdiction Was Lacking Because Plaintiffs' Action Essentially Sought Resolution Of A Border Dispute Between Two Sovereign States.

Plaintiffs' complaint sought nothing less than a declaration of sovereignty and jurisdiction over islands which lie in New York Harbor on the New Jersey side of the border line which divides the states. That border, the indicia of sovereignty, was established in an 1834 Compact between New Jersey and New York which agreement was intended to settle the long-term border dispute between the states. In that Compact New York was permitted to "retain its present jurisdiction of and over Bedloe's and Ellis' Islands. . . ." *N.J. Stat. Ann.* § 52:28-3. There is no question but that New Jersey and New York disagree

on the proper interpretation of this statutory language in the Compact. What they do agree on, however, is that any dispute should be settled by negotiation not litigation. Having made that determination private citizens should not be allowed to abrogate it by suing both sovereigns as defendants in state court. If New Jersey or New York had wanted a Court to decide their differences, one of them would have filed a petition directly in this Court as New Jersey once did prior to the 1834 Compact. (For a concise description of the Compact and the history which immediately preceded its enactment *see State v. Carlaftes,* 24 *N.J.* 451, 132 *A.*2d 515 (1957).)

Clearly a border dispute of this nature, if it is to be litigated at all, must be brought only in this Court. The United States Constitution Art. III, § 2 provides in part that, "in all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." Congress has provided that in controversies between two or more states the jurisdiction of the Supreme Court is both original and exclusive. 28 *U.S.C.* § 1251(a).

Border disputes are *the* classic case for original and exclusive United States Supreme Court jurisdiction. *See e.g. Rhode Island v. Massachusetts,* 12 *Pet.* 657 (1838). The statement in petitioners' brief that, "the attempt by Congress to define the original and exclusive jurisdiction of the United States Supreme Court by statute is contrary to the Constitution" (p.20) is, at this point in time, nothing short of amazing. The first version of 28 *U.S.C.* 1251(a) came into being with the First Congress, within six months of the inauguration of the Government under the Constitution. The statute itself was drafted by Oliver

Ellsworth, a member of the Constitutional Convention and later Chief Justice of this Court. The legislation was voted upon by many who were personally aware of the discussions within the Constitutional Convention. The statutes stated that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party. Judiciary Act, *ch.* 20, 1 *Stat.* 73 (1789); *Ames v. Kansas,* 111 *U.S.* 449, 463-465 (1884). This Court's approval of 28 *U.S.C.* § 1251(a) has remained unchanged. Essentially the statute honors the original thought behind the constitutional language. *Illinois v. City of Milwaukee,* 406 *U.S.* 91 (1972). In Justice Black's concurring opinion in *Durfee v. Duke,* 375 *U.S.* 106, 116 (1963), a suit between private parties concerning border land, he cited to 28 *U.S.C.* § 1251(a) as well as to *U.S. Const.* Art. III, §2 for the proposition, "Neither State, of course, has power to make a determination binding on the other as to which state the land is in." It appears that 198 years of judicial endorsement of and acquiescence in 28 *U.S.C.* 1251(a) is of no consequence to petitioners.

Plaintiffs' remarkable assertion that exclusive original jurisdiction may be unconstitutional is buttressed with a quote from Justice Brennan in *Texas v. New Mexico,* 462 *U.S.* 554 (1983) wherein he noted the Court has discretion in the application of 28 *U.S.C.* 1251(a). Certainly these comments were never intended to authorize the litigation of a border dispute in a state court which would be binding on the states by virtue of their status as defendants. In *Texas v. New Mexico* the two states had entered into the Pecos River Compact to govern the allocation of water from a river which arose in New Mexico and flowed into Texas. The Compact was approved by Congress and its

provisions created a Commission to administer it. A dispute arose as to how much water Texas was entitled to and the Commissioners from each state could not agree on a resolution. Texas then filed an original action against New Mexico in this Court and a Special Master was appointed. The Court's opinion was given in response to the Master's report. In the course of the unanimous opinion Justice Brennan acknowledged the Court's original jurisdiction over Compact disputes between states. He further indicated that if it were clear from the Compact itself that the Commission was to be the exclusive forum for disputes arising under the Compact (which it was not) then the Court would honor that provision. 462 *U.S.* at 569. On the other hand, New Mexico suggested that every decision by the Commission was reviewable by the disappointed state on an original petition to this Court. It was in the context of rejecting this suggestion of wholesale jurisdiction over routine matters that the Court noted it had some discretion under 28 *U.S.C.* 1251(a) and cited two prior cases, one of which (*Maryland v. Louisiana,* 451 *U.S.* 725 (1981)) concerned an attack by the United States as well as individual states on a use tax as violative of the Commerce and Supremacy clauses, the other of which (*Ohio v. Wyandatte Chemicals Corp.,* 401 *U.S.* 493 (1971)) concerned a state's attempt to sue private companys which had created a pollution nuisance. Understandably this Court did not want to become the automatic reviewer of every routine decision issued by the Pecos River Compact Commission with which one state disagreed. In articulating this obvious reluctance and citing other cases involving specific fact patterns, the Court was doing no more than defining the statutory phrase "controversies between

two or more states." It is clear, however, that once the litigation comes within that phrase, this Court's jurisdiction is indeed original and exclusive. Thus in a footnote Justice Brennan said, "the model case for invocation of this Court's original jurisdiction is a dispute between states of such seriousness that it would amount to *casus belli* if the states were fully sovereign. *North Dakota v. Minnesota,* 263 US 365, 372-374, . . . (1923); *Missouri v. Illinois,* 200 US 496, 519-521 . . . (1906)." 462 *U.S.* at 571 n.18.

The *North Dakota* case involved a claim that Minnesota had altered an interstate river in such a way as to cause flooding and destruction of property in North Dakota. The *Missouri* case concerned an allegation that one state was discharging polluted water into another state thereby causing typhoid fever. If these situations are *casus belli,* then a dispute as to which state may exercise sovereignty and jurisdiction over land on their common border must also fall into that category. As a matter of historical fact when the United States Constitution was being drafted ten states were in serious disputes concerning boundaries, land and river rights. During the Court's first sixty years the few state disputes coming before it were exclusively boundary disputes. "Warren, the Supreme Court and Disputes Between States," 34 *Bull. of William and Mary,* No. 4 at 7-14 (1940).

If petitioners' legal analysis were correct this Court's original and exclusive jurisdiction over significant disputes between states would become a nullity. While it is possible to come up with any number of cases where this Court has declined jurisdiction, those cases are not analogous to the present case. There is no decision to be found where this

Court has ever turned away a true boundary dispute between two states or indicated that state courts were a viable option. Thus in *Durfee v. Duke* private parties sued other private parties over who owned land in the Missour River which forms the Missouri/Nebraska boundary line. Justice Stewart writing for a virtually unanimous court said that if private parties litigate the issue of whether certain land is located in one state or another, either state may at any time protect its interest, "by initiating independent judicial proceedings here." 375 *U.S.* at 116. Significantly he did not say that the states might voluntarily join in the state litigation, much less the current proposition that two states can be forced to litigate a border dispute in a state court by naming them as defendants.

No case cited by petitioners stands for the proposition that a state court may adjudicate a dispute between two sovereigns over their exercise of sovereign authority. Reliance upon *Arizona v. New Mexico,* 425 *U.S.* 794 (1976) is misplaced. There, Arizona in its proprietary capacity as a consumer of electrical energy and as *parens patriae* for its citizen consumers, sought to invoke this Court's original jurisdiction. It contended that a New Mexico electrical energy tax imposed on Arizona utilities operating facilities in New Mexico was unconstitutional. This Court declined jurisdiction because the Arizona utilities had previously instituted an action in a New Mexico State Court challenging the New Mexico tax and raising the same constitutional issues that would be presented if Arizona were allowed to proceed in this Court. The pending state court action provided an appropriate forum for litigation of the issues. Certainly, petitioners in the present case are not

aided by *Arizona v. New Mexico.* The state court proceeding which was found to block Arizona's efforts at original jurisdiction did not involve sovereign versus sovereign but rather public utilities versus a state and therefore was properly ongoing in the state court forum. *See e.g., Illinois v. City of Milwaukee,* 406 *U.S.* 91 (1972). To turn *Arizona v. New Mexico* on its head and assert that its supports a claim that a border dispute may be brought in state court is, to say the least, inappropriate.

So too, in *Cissna v. Tennessee,* 246 *U.S.* 289 (1917), another case relied on by petitioners, this Court's review of a state court's interpretation of a Compact as it affects the title rights of private parties does not stand for the proposition that a state court may hear suits involving the sovereign disputes of two states. Note that this Court's reversal in *Cissna* stems from its decision in *Arkansas v. Tennessee,* 246 *U.S.* 158 (1917), a suit within the original jurisdiction of this Court to settle the same boundary at issue in *Cissna.*

The complaint filed by plaintiffs and dismissed by the New Jersey trial court set forth the elements of a classic border dispute. That New Jersey was named as a "necessary defendant" confirms plaintiffs' grand scheme to litigate not a tax question but a boundary question in such a way that both states would be held to the result. New Jersey's answer to the complaint establishes the controversy between sovereign states. The controversy stems from issues of sovereignty that are *casus belli.* This Court has frequently urged negotiations between states rather than litigation. *See e.g., Texas v. New Mexico,* 462 *U.S.* at 575 and *Durfee v. Duke,* 375 *U.S.* at 116 n. 15. This is exactly what New Jersey and New York have attempted to

do through the good faith efforts of their respective governors but plaintiffs feel it is their right to bring both sovereigns before a state court judge to litigate the border between those states. This they cannot do.

B. The New Jersey Trial Court's Determination That Suit Against New York Was Foreclosed By Reason Of Sovereign Immunity And Comity Presents No Basis For A Grant Of The Writ.

Although the absence of jurisdiction was the primary basis for dismissal of the complaint, tht trial court also concluded that principles of sovereign immunity and comity prevented private New Jersey citizens from suing New York State in a New Jersey court, under the particular circumstances of this case. In the intermediate appellate court and in the brief presented to the New Jersey Supreme Court, New Jersey took the position that it would not comment on these issues because they primarily concerned New York. Except for the following limited comments directed only at the propriety of this Court's grant of *certiorari,* New Jersey will continue to leave New York with the laboring oar.

It is apparent from the trial judge's opinion that he drew heavily from *Nevada v. Hall,* 440 *U.S.* 410 (1979) in applying New Jersey law and concluding New York was entitled to the protective mantle of sovereign immunity. To the extent reliance was placed on the majority opinion in *Nevada v. Hall,* the trial court's determination presents no question of constitutional dimension or interpretation of federal law. What is clear from the majority in *Nevada v. Hall,* is that the acceptance of a sister state's claim of sovereign immunity is a matter of state law, not constitu-

tional compulsion. *Id.* at 418-419, 425-427. Accordingly, there is no basis to grant review of this application of New Jersey law and policy.

To the extent that the trial court's opinion can be read as relying on the dissents in *Nevada v. Hall* and implying thereby that something implicit in the United States Constitution requires acceptance of New York's claims of sovereign immunity, there is also no impetus for a grant of *certiorari.* The present case does not arise from a run-of-the-mill tort action which happened to involve a vehicle owned by a sister state. Rather it concerns New York's exercise of an attribute of sovereignty, the taxing power, under a claim of right grounded in a bistate Compact.* Given this context, it is not at all clear that a constitutional analysis reaching a conclusion that sovereign immunity should prevail would in any way be at odds with the majority opinion in *Nevada v. Hall. Id.* at 424, n. 24. In light of the result in this case and absent any indication that the calamitous consequences envisioned by the dissenters in *Nevada v. Hall* (*id.* at 443) have actually occurred, this case is a poor vehicle to reconsider the footings of sovereign immunity.

So too, the trial court's reliance on principles of comity present no basis for review by this Court. By definition comity is a courtesy extended by a forum state to another state. *Philadelphia v. Austin,* 86 *N.J.* 55, 64, 429 *A.*2d 568, 572 (1981). Even an erroneous application of comity in favor of the non-forum state can hardly be said to rise

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* New Jersey's strong disagreement with New York's interpretation of the Compact is not germane to this specific question of sovereign immunity.

above a breach of forum-state policy. It does not implicate constitutional considerations and should not be the subject of review by this Court.

C. The New Jersey Trial Court Correctly Determined As A Matter Of State Law That Plaintiffs Did Not Have Standing To Litigate A Border Dispute Against New York And New Jersey.

The final prong of the trial court's analysis was a determination that plaintiffs had no standing to sue in New Jersey. Although that analysis, of necessity, requires an evaluation of the true nature of the litigation and thus in this case a reaffirmation of the previous conclusion that plaintiffs were seeking declarations of sovereignty, at bottom is the undisputable fact that standing, *vel non,* turns on state law. *Salorio v. Glaser,* 82 *N.J.* 482, 490-491, 414 *A.*2d 943, 947 (1980), app. dism., *cert.* den. 449 *U.S.* 804 (1980). While New Jersey has historically taken a liberal approach to standing, *Crescent Park Tenants Assoc. v. Realty Eq. Corp of N.J.,* 58 *N.J.* 98, 107, 275 *A.*2d 433, 437-438 (1971), even liberality has its limitations. *See e.g., Bergen County v. Port of New York Authority,* 32 *N.J.* 303, 160 *A.*2d 811 (1960).

It cannot be seriously argued that the involvement of a bistate compact in the underlying litigation somehow transforms the standing issue into a matter of federal law or constitutional imperative. Whatever else may be argued over in the 1834 Compact, it certainly does not invite private parties to sue its signatories over its interpretation. In a Republic, as opposed to a pure democracy, some contentions simply cannot be litigated by private citizens. In New Jersey the Governor is constitutionally

charged with enforcement of legislation, *N.J. Const.* (1947), Art. V, § I, ¶ 11, and the New Jersey Attorney General is exclusively authorized to litigate on behalf of the state. *N.J. Stat. Ann.* § 52:17A-4. Moreover petitioners' current contention that New York's taxing authority on the Islands contravenes both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment is nowhere to be found in their complaint. The action that was dismissed contended only that the tax levy was *ultra vires* New York's sovereign and jurisdictional power.

Petitioners' present efforts to focus on plaintiff Colon and her payment of $1.35 in sales tax to New York, ignores what was found to be the primary thrust of the complaint and completely fails to deal with the fact New Jersey was named as a "necessary defendant." New Jersey was a necessary defendant because plaintiffs wished to bind New Jersey to a declaration of sovereignty concerning Ellis and Liberty Islands, not because plaintiff Colon wanted redress for a personal expenditure. Were this merely litigation by private parties to vindicate private interests, which incidentally involved a bistate agreement, there would be little argument over jurisdiction and standing. Such suits have been brought over the years in both New Jersey and New York State Courts. *See e.g. Tennant v. State Bd. Taxes & Assessments,* 95 *N.J.L.* 465, 113 *A.*254 (E.&A. 1921) (Jersey City may tax personal property moored in tidewaters of New York Bay within the territorial limits of New Jersey); *Cook v. Weigley,* 72 *N.J. Eq.* 221, 65 *A.*196 (Ch. 1906) (New Jersey Court has jurisdiction to enforce mortgage foreclosure of islands in New York Harbor on New Jersey side of boundary); *Clarke v. Ackerman,* 243 *App. Div.* 446, 278 *N.Y.S.* 75 (App. Div. 1935) (automobile

negligence action arising out of accident on New Jersey's side of George Washington Bridge where plaintiff made service of process according to New York law); *Ferguson v. Ross,* 126 *N.Y.* 459, 27 *N.E.* 954 (1891) (penalty action brought by New York shore inspector to recover penalty for depositing dredging on New Jersey's side of boundary line).

Perhaps petitioners cling so tenaciously to plaintiff Colon because the other individuals named as plaintiffs, with the possible exception of the union members, show no more relationship to Ellis and Liberty Islands than any other citizen of New Jersey. Thus the plaintiffs have insufficient interest to bring a conventional taxpayer suit much less a full scale attack on a bistate compact and the sovereign rights of New Jersey and New York. Under New Jersey law these plaintiffs do not have even the "slight additional private interest" necessary to afford standing to litigate questions of great public importance. *Salorio v. Glaser,* 82 *N.J.* at 491, 414 *A.*2d at 947.

As to Colon herself, the relief sought in plaintiffs' complaint was not a refund of taxes improperly paid but rather "judgment declaring that the defendant State of New York does not possess jurisdiction or sovereignty over Ellis Island and Liberty Island and the accretions thereto and enjoining . . . New York and its political subdivisions from collecting and levying taxes on Ellis Island and Liberty Island." (8a). A taxpayer should not be permitted standing to sue two sovereign states and seek a declaration of sovereignty binding upon both under the claim that such is the right of anyone who has paid New York sales tax on the islands. As the New Jersey Appellate Division indicated in a footnote, Colon may very well have a legiti-

mate lawsuit against New York taxing authorities but the complaint must be recast without New Jersey as a necessary party and should be brought in a New York State Court.

Finally, as to the New Jersey union members who claim a loss of work because New York union members are employed instead of New Jersey union members, one can only wonder how this purported problem is necessitated by New Jersey and New York's dispute over the Islands or indeed how such a problem may be litigated in the absence of the unions as parties. Private labor unions are free to allocate territorial work on any bases they choose. Exactly how conflicting sovereignty claims between New Jersey and New York resulted in a situation favoring New York unions is not explained. At first blush it would seem a border dispute between New Jersey and New York would leave the unions in equipoise or perhaps urge them to look further for resolution of their territorial dispute. If a certain union chooses to ignore the boundary line which indisputably puts the Islands within New Jersey's territory, in favor of New York's claim of extraterritorial jurisdiction, it would seem that is a matter for debate between unions and employers in light of the respective contracts and rules which govern their relationship. Because private entities cannot agree on private rights is no reason to seek declarations of sovereignty binding upon both states. It is a basis for private litigation which will settle private rights without also implicating the sovereignty of adjacent states.

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CONCLUSION

For the foregoing reasons the petition for a writ of *Certiorari* in this case should be denied.

Respectfully submitted,

W. Cary Edwards
Attorney General of New Jersey

By: James J. Ciancia
Assistant Attorney General
Counsel of Record

Dated: May 26, 1987

APPENDIX

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION : HUDSON COUNTY

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Plaintiffs,	Civil Action
vs.	COMPLAINT
THE STATE OF NEW YORK,	
Defendant,	
- and -	
THE STATE OF NEW JERSEY, a necessary defendant.	

Plaintiffs, Frank J. Guarini, residing at 201 St. Pauls Avenue, Jersey City, New Jersey 07306; Gerald McCann, residing at 210 Gates Avenue, Jersey City, New Jersey 07305; Dr. Irwin Silverman, residing at 911 Boulevard East, Weehawken, New Jersey; Robert J. Del Tufo, residing at 35 Colles Avenue, Morristown, New Jersey 07960; Dr. Lena Edwards, residing at 821 Woodland Drive, Lakewood, New Jersey 08701; John M. Stiles, residing at 5 Kaufman Drive, Westwood, New Jersey 07675; Rev. Raymond J. Kupke, residing at 18 Changebridge Road, Montville, New Jersey 07047; Nidia Davila Colon, residing at 338 Second Street, Jersey City, New Jersey 07302; Dr. Sang Jin Kim, residing at 108 Eagle Ridge Drive West Orange, New Jersey 07052, Harry Bisharian, residing at 337 Lucy Drive, New Milford, New Jersey 07646 and Walter Irwin, residing at 8 Hilltop Lane, Succasunna, New Jersey 07876, by way of complaint against defendant, say:

FIRST COUNT

1. Plaintiffs are residents, citizens and taxpayers of the defendant State of New Jersey.

2. On or about March 12, 1664 Charles II granted territory to James, Duke of York, that extended along the Atlantic coast and included the territory that is today the State of New Jersey and the State of New York.

3. On or about June 24, 1664 James, Duke of York, conveyed by a deed of release to Lord Berkeley and Sir George Carteret proprietorship in New Jersey which was described as the area between the sea and the Hudson River on the east and the Delaware River on the west.

4. The territory granted to the Duke of York was recognized by the Dutch in 1673. After the rule of Great Britain was restored, Charles II in 1674 granted the same domain to the Duke of York as was granted in the Charter of 1664.

5. In 1674 the Duke of York reconveyed the eastern parts of New Jersey to Sir George Carteret and later the western parts to the grantees of Lord Berkeley on the same terms as the previous grant.

6. Following the partition of East Jersey and West Jersey and the death of Sir George Carteret, a conveyance of East Jersey was made to twenty-four proprietors in 1682. In 1683 the Duke of York made a confirmatory grant to the twenty-four proprietors of East Jersey.

7. In 1685 James, Duke of York, succeeded to the British Crown and any and all rights to the Hudson River and the islands therein then held by the Duke of York were reannexed to the Crown.

8. In 1702 the proprietors surrendered all governmental powers to Queen Anne, acknowledging that all future governmental powers belonged to the Crown. The proprietors did not relinquish title to private property, including title to Ellis Island and Liberty Island.

9. From 1702 until the independence of the State of New Jersey and State of New York from British rule all sovereignty, jurisdiction and *jura regalia* over the Hudson River belonged to the British crown.

10. When the State of New Jersey and the State of New York became independent States, the sovereignty, jurisdiction and rights to that part of the Hudson River

that forms the boundary between the two States was divided under the precepts of international law such that all territory east of the middle of the river falls within the State of New York and all territory west of the middle of the river falls within the State of New Jersey.

11. Two parcels of property, Ellis Island and Liberty Island (formerly known as Bedloe's Island), were at the time of the formation of the defendant State of New York and the defendant State of New Jersey located on the New Jersey side of the Hudson River and fell under the territorial jurisdiction and sovereignty of the defendant State of New Jersey.

12. In 1834 a compact was entered into between the defendants (*N.J.S.A.* 52:28-1, et seq.; 56 *McKinney's State Laws,* section 7), pertaining to jurisdiction over Ellis Island and Liberty Island.

13. At the time the compact was entered into between defendants, Ellis Island was approximately 3 acres in size. Subsequent to the compact, landfill to the island below the water line has increased the size of Ellis Island by approximately 24.5 acres.

14. The defendant State of New York has wrongfully exercised and continues to exercise jurisdiction and sovereignty over Ellis Island and Liberty Island purportedly pursuant to the compact of 1834 by engaging in the following activities: (a) levying sales taxes on the islands and collecting those taxes; (b) levying state income tax on persons residing or working on the islands and collecting those taxes; and (c) exercising police powers over the islands and the persons who live and work on the islands or visit the islands.

15. The compact entered into between defendant States in 1834 did not vest the defendant State of New York with jurisdiction or sovereignty over Ellis Island and Liberty Island.

16. The levy and collection of taxes on Ellis Island and Liberty Island, including the taxation of sales and business transactions on those islands by the defendant State of New York and its political subdivisions, has deprived and will continue to deprive the defendant State of New Jersey of tax revenues.

17. The levy and collection of these tax revenues by the defendant State of New Jersey will lessen the tax burden on plaintiffs by providing greater revenues to the State of New Jersey.

18. There is a genuine controversy between the plaintiffs, the defendant State of New Jersey and the defendant State of New York as to the rights of the parties in, to and over the two parcels of property.

19. The controversy was not resolved when litigation was instituted in the United States Supreme Court by the defendant State of New Jersey in 1829.

20. The controversy was not resolved by the 1834 compact which, among other things, provided in Article II that New York should "retain its present jurisdiction," whatever that may have been, if any, over the two parcels.

21. There are presently proposals under consideration for the development of the two parcels warranting that a determination be made fixing and declaring the rights of the State of New York, if any, in, to and over the two parcels.

WHEREFORE, plaintiffs seek a judgment declaring that pursuant to the compact of 1834 or independent thereof the defendant State of New York does not possess jurisdiction or sovereignty over Ellis Island and Liberty Island and the accretions thereto and that sovereignty and jurisdiction are within the defendant State of New Jersey and enjoining the State of New York and its political subdivisions from collecting and levying taxes on Ellis Island and Liberty Island or exercising police power.

SECOND COUNT

1. Plaintiff adopt the paragraphs set forth in the First Count.

2. The lands under the sovereignty of the defendant State of New Jersey have at all times, pursuant to the laws of New Jersey, been held in trust by the sovereign for the benefit of the people of the State of New Jersy, and plaintiffs are among the direct beneficiaries of this trust.

3. The compact of 1834 entered into by the defendants, to the extent that it can be interpreted and construed as giving the defendant State of New York jurisdiction or sovereignty over Ellis Island and Liberty Island and the accretions thereto, is void and ultra vires the powers of the signatories.

WHEREFORE, plaintiffs seek judgment declaring invalid the purported grant of jurisdiction or sovereignty to the defendant State of New York by the compact of 1834 and that sovereignty and jurisdiction are within the defendant State of New Jersey and enjoining the defendant State of New York and its political subdivisions from collecting and levying taxes on Ellis Island and Liberty Island or exercising police power.

THIRD COUNT

1. Plaintiffs adopt the paragraphs set forth in the first and second counts.

2. The landfill and accretions to Ellis Island, consisting of approximately 24.5 acres, fall within the territorial jurisdiction and the sovereignty of the defendant State of New Jersey under the terms of the compact of 1834.

WHEREFORE, the plaintiffs seek a judgment declaring that the accretions and fill to Ellis Island are within the exclusive jurisdiction and sovereignty of the defendant State of New Jersey and enjoining the defendant State of New York and its political subdivisions from collecting and levying taxes on that portion of Ellis Island or exercising police power.

FOURTH COUNT

1. Plaintiffs adopt the paragraphs set forth in the first, second and third counts.

2. On November 8, 1984 plaintiff Nidia Davila Colon purchased the following items on Liberty Island, a replica of the Statute of Liberty, a banner and a souvenir plate.

3. Incident to the purchase of said item, plaintiff was required to pay $1.35 sales tax to the State of New York and its political subdivisions pursuant to the asserted sovereignty and jurisdiction over Liberty Island by the defendant State of New York.

4. The collection and levy of these taxes by the defendant State of New York and its political subdivisions was ultra vires its sovereign and jurisdictional power.

5. Plaintiff was injured in that she was compelled to pay taxes that were due to the defendant State of New Jersey to the defendant State of New York and its political subdivisions. The amount paid by plaintiff to the defendant State of New York and its political subdivisions was greater than that which she would have been required to pay to the defendant State of New Jersey.

WHEREFORE, plaintiff seeks judgment declaring that the defendant State of New York does not possess jurisdiction or sovereignty over Ellis Island and Liberty Island and the accretions thereto and enjoining the defendant State of New York and its political subdivisions from collecting and levying taxes on Ellis Island and Liberty Island.

FIFTH COUNT

1. Plaintiffs adopt the paragraphs set forth in the first, second, third and fourth counts.

2. The defendant State of New York has acquired tax revenues from Ellis Island and Liberty Island and from persons who live or work on Liberty Island and Ellis Island that rightfully belong to the defendant State of New Jersey.

3. Retention of those tax revenues by the State of New York will result in unjust enrichment of that defendant.

WHEREFORE, plaintiffs demand judgment imposing a constructive trust on all tax revenues heretofore and hereafter collected by the defendant State of New York that were or are collected on Liberty Island and Ellis Island and that were or are collected from persons who

live or work on Liberty Island and Ellis Island and a restraint from future collection of such taxes.

SIXTH COUNT

1. Plaintiffs adopt the paragraphs set forth in the first, second, third, fourth and fifth counts.

2. Plaintiffs Harry Bisharian and Walter Irwin are members of the United Association of Plumbers, Pipe Fitters and Sprinkler Fitters, Local 274, AFL-CIO, located in Ridgefield, New Jersey.

3. Two Hundred and Fifty Million Dollars ($250,000,000.00) is anticipated to be spent on the renovation of the Statue of Liberty and Ellis Island. Jobs related to the restoration of Liberty Island and Ellis Island have been awarded to New York Unions pursuant to the territorial and jurisdictional claims of the defendant State of New York.

4. The award of labor contracts to unions located in the defendant State of New York has resulted in the loss of job opportunities for plaintiffs Harry Bisharian and Walter Irwin.

5. Future construction and restoration of Liberty Island and Ellis Island will require the employment of members of labor unions, and the decision of which local union will be employed will be based on the sovereignty and jurisdiction of defendants over Ellis Island and Liberty Island.

WHEREFORE, plaintiffs demand judgment declaring that the defendant State of New York does not possess jurisdiction or sovereignty over Ellis Island and Liberty

Island and the accretions thereto and that sovereignty and jurisdiction are held by the defendant State of New Jersey.

MARGULIES, MARGULIES & WIND
A Professional Corporation

/s/ Seymour Margulies
By: Seymour Margulies
Attorney for plaintiffs

MAURICE C. BRIGADIER, ESQ.

/s/ Maurice C. Brigadier
By: Maurice C. Brigadier
Of counsel
On the pleading:
Clifford A. Herrington

DATED:

CERTIFICATION PURSUANT TO RULE 4:5-1

It is hereby certified that this matter is not the subject of any other action pending in any Court or of a pending arbitration proceeding and no such other action or arbitration is presently contemplated. Plaintiffs are unaware of any other party who should be joined in the action.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Seymour Margulies

Dated:
CAH/sr
11/09/84
elis islecom
abel: octob84

FRANK J. GUARINI, GERALD McCANN, DR. IRWIN SILVERMAN, ROBERT J. DEL TUFO, DR. LENA EDWARDS, JOHN M. STILES, REV. RAYMOND J. KUPKE, NIDIA DAVILA COLON, DR. SANG JIN KIM, HARRY BASHARIAN and WALTER IRWIN, Plaintiffs, v. THE STATE OF NEW YORK, Defendant, and THE STATE OF NEW JERSEY, A Necessary Defendant.	Superior Court of New Jersey Chancery Division Hudson County Docket No. ANSWER Filed 10/18/85

Defendant, the State of New Jersey, by way of answer to the complaint, says:

FIRST COUNT

1. On information and belief the State admits the allegations of paragraph 1 of the First Count of the Complaint.

2. On information and belief the State admits the allegations of paragraph 2.

3. On information and belief the State admits the allegations of paragraph 3.

4. On information and belief the State admits the allegations of paragraph 4.

5. On information and belief the State admits the allegations of paragraph 5.

6. On information and belief the State admits the allegations of paragraph 6.

7. On information and belief the State admits the allegations of paragraph 7.

8. On information and belief the State admits the allegations of paragraph 8.

9. On information and belief the State admits the allegations of paragraph 9.

10. On information and belief the State admits the allegations of paragraph 10.

11. On information and belief the State admits the allegations of paragraph 11.

12. On information and belief the State admits the allegations of paragraph 12.

13. On information and belief the State admits the allegations of paragraph 13.

14. The State joins in the allegations contained in paragraph 14, except it denies information and knowledge that the State of New York has wrongfully exercised police powers over the islands and the persons who live on, work on, or visit the islands.

15. The State neither admits nor denies the allegations of paragraph 15, but relies upon the terms of the 1834 compact.

16. The State joins in the allegations contained in paragraph 16 of the First Count of the Complaint.

17. The State joins in the allegations contained in paragraph 17 of the First Count of the Complaint.

18. The State admits the allegations contained in paragraph 18.

19. The State admits that a bill filed against the State of New York in the United States Supreme Court in 1829 was dismissed and that the issues raised by that bill were not resolved by the Supreme Court as stated in the allegations of paragraph 19.

20. The State asserts that the 1834 compact did resolve and settle the respective rights of New York and New Jersey to the islands in question and denies the allegations of paragraph 20.

21. The State admits the allegations of paragraph 21 of the First Count of the Complaint.

SECOND COUNT

1. The State repeats its responses to the First Count.

2. The State admits the allegations of paragraph 2 of the Second Count of the Complaint.

3. The State neither admits nor denies plaintiffs' interpretation of the 1834 compact, but denies that the compact is void and *ultra vires* of the powers of the signatories as stated in the allegations of paragraph 3.

THIRD COUNT

1. The State repeats its response to the First and Second Counts as if set forth at length herein.

2. The State admits the allegations of paragraph 2 of the Third Count of the Complaint.

FOURTH COUNT

1. The State repeats its responses to the First, Second and Third Counts.

2. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2.

3. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3.

4. While having no knowledge as to the collection of the specific taxes as alleged in paragraph 4, the State adopts the position that the collection and levy of taxes by defendant New York and its political subdivisions is *ultra vires* its sovereign and jurisdictional powers.

5. The State lacks knowledge or information sufficient to form an opinion as to the allegations of paragraph 5 of the Fourth Count of the Complaint.

FIFTH COUNT

1. The State repeats its responses to the First, Second, Third and Fourth Counts.

2. The State adopts the allegations of paragraph 2 of the Fifth Count of the Complaint.

3. The State adopts the allegations of paragraph 3 of the Fifth Count of the Complaint.

SIXTH COUNT

1. The State repeats its responses to the First, Second, Third, Fourth and Fifth Counts.

2. The State is without knowledge or information sufficient to form an opinion as to the allegations of paragraph 2 of the Sixth Count.

3. The State admits that renovations and alterations to the Statue of Liberty are underway and that developments on the two islands are being considered, but lacks knowledge or information sufficient to form an opinion as to the remaining allegations of paragraph 3.

4. The State lacks knowledge or information sufficient to form an opinion as to the allegations of paragraph 4 of the Sixth Count of the Complaint.

5. The State lacks knowledge or information sufficient to form an opinion as to the allegations of paragraph 5 of the Sixth Count of the Complaint.

FIRST DEFENSE

The complaint raises a boundary dispute and a dispute as to the respective sovereignty of defendants the State of New York and the State of New Jersey and jurisdiction properly lies in the United States Supreme Court.

SECOND DEFENSE

The Complaint fails to state a cause of action upon which relief may be granted.

THIRD DEFENSE

This action is barred by the Eleventh Amendment to the United States Constitution.

FOURTH DEFENSE

Plaintiffs lack standing to raise the issues specified in their complaint.

WHEREFORE defendant, the State of New Jersey, demands judgment dismissing the complaint, together with costs of suit and such other relief as the Court deems just and proper.

IRWIN I. KIMMELMAN
Attorney General of New Jersey

By: /s/ Dorothy Donnelly
Dorothy Donnelly
Deputy Attorney General
Division of Law
Richard J. Hughes Justice Complex
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FRANK J. GUARINI, Member of the House of Representatives, et al.,	)	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: HUDSON COUNTY DOCKET NO. C-4776-84
Plaintiffs,	)	
vs.	)	
THE STATE OF NEW YORK and THE STATE OF NEW JERSEY,	)	ANSWER
	)	Filed 10/16/85
Defendants.	)	

Defendant, State of New York, by its attorneys, Robert Abrams, Attorney General of the State of New York, and Clemente, Strenk & Kiernan, in answer to the Complaint herein alleges as follows:

AS TO THE FIRST COUNT

1. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

2. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

3. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

4. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

5. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

6. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

7. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

8. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

9. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

10. Denied.

11. Denied.

12. It denies each and every allegation contained in this paragraph and respectfully refers the Court to

Twenty-third Congress, Act of June 28, 1834 (4 U.S. Stat. 708, Ch. 126).

13. Admitted.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

WHEREFORE, defendant State of New York demands judgment dismissing the Complaint against it with costs and fees.

AS TO THE SECOND COUNT

1. It repeats and realleges each and every answer to the allegations of the previous Count as if set forth at length herein.

2. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

3. Denied.

WHEREFORE, defendant State of New York demands judgment dismissing the Complaint against it with costs and fees.

AS TO THE THIRD COUNT

1. It repeats and realleges each and every answer to the allegations of the previous Counts as if set forth at length herein.

2. Denied.

WHEREFORE, defendant State of New York demands judgment dismissing the Complaint against it with costs and fees.

AS TO THE FOURTH COUNT

1. It repeats and realleges each and every answer to the allegations of the previous Counts as if set forth at length herein.

2. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

3. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

4. Denied.

5. Except to state that it is without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff Nidia Davila Colon paid any taxes at all to the State of New York and that the State of New Jersey would have required her to pay an amount of taxes that was less than she allegedly paid to the State of New York, it denies each and every remaining allegation contained in this Paragraph.

WHEREFORE, defendant State of New York demands judgment dismissing the Complaint against it with costs and fees.

AS TO THE FIFTH COUNT

1. It repeats and realleges each and every answer to the allegations of the previous Counts as if set forth at length herein.

2. Denied.

3. Denied.

WHEREFORE, defendant State of New York demands judgment dismissing the Complaint against it with costs and fees.

AS TO THE SIXTH COUNT

1. It repeats and realleges each and every answer to the allegations of the previous Counts as if set forth at length herein.

2. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph.

3. Except to deny any implication that the defendant, State of New York, has awarded any contract to "New York Unions," it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this Paragraph.

4. Denied.

5. Denied.

WHEREFORE, defendant State of New York demands judgment dismissing the Complaint against it with costs and fees.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Service of process is insufficient.

THIRD DEFENSE

This Court lacks personal jurisdiction over the defendant, State of New York.

FOURTH DEFENSE

This Court lacks subject matter jurisdiction over this action.

FIFTH DEFENSE

Plaintiffs lack proper standing to sue.

SIXTH DEFENSE

The Complaint fails to set forth a ripe case or controversy.

SEVENTH DEFENSE

This action is barred by the statutes of limitations.

EIGHTH DEFENSE

This action is barred by the doctrine of laches.

NINTH DEFENSE

This action is barred by the doctrine of sovereign immunity.

TENTH DEFENSE

This action is barred by the doctrine of "full, faith and credit."

ELEVENTH DEFENSE

This action is barred by the doctrine of "comity."

TWELFTH DEFENSE

This action is barred by collateral estoppel.

THIRTEENTH DEFENSE

This action is barred by the doctrine of prescription and acquiescence.

WHEREFORE, defendant State of New York demands judgment dismissing the Complaint against it with costs and fees.

CLEMENTE, STRENK & KIERNAN
Attorneys for Defendant
State of New York

By: /s/ Jeffrey P. Clemente
Jeffrey P. Clemente

ROBERT ABRAMS
Attorney General of the
State of New York

By: /s/ Judith T. Kramer
Judith T. Kramer
Assistant Attorney General

DATED: October 15, 1985

R.4:5-1 CERTIFICATION

The undersigned does hereby certify that the matter in controversy is not the subject of any other action pending or presently contemplated in any other court or of a pending or presently contemplated arbitration proceeding.

/s/ Jeffrey P. Clemente
Jeffrey P. Clemente

CERTIFICATION

The undersigned does hereby certify that the within pleading has been duly filed and served within the time prescribed by the New Jersey Rules of Court.

/s/ Jeffrey P. Clemente
Jeffrey P. Clemente

DATED: October 15, 1985
BK14:T

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1739

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FRANK J. GUARINI, GERALD McCANN, IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN,
Petitioners,

vs.

THE STATE OF NEW YORK, and
THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW YORK

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QUESTIONS PRESENTED

Whether this Court should grant the petition for a writ of certiorari when the relief sought by individual citizens of one State, in an action brought against another State in state court, is a declaration as to which of the two States may exercise jurisdiction and sovereignty over certain land, when neither State desires to litigate the issue?

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No. 86-1739

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FRANK J. GUARINI, GERALD McCANN, IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN,
Petitioners,

vs.

THE STATE OF NEW YORK, and
THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW YORK

STATEMENT OF THE CASE

A. *Facts*

In 1834, Congress approved a Compact entered into by the States of New York and New Jersey establishing the boundaries of the two states. (4 U.S. Stat. 708, ch. 126). Under the terms of the Compact, New York retained jurisdiction over Liberty and Ellis Islands. It has continued to exercise jurisdiction over the Islands under the Compact for the past 150 years, and collects sales and income taxes on the Islands.

Eleven residents of the State of New Jersey initiated this action against the State of New York as a defendant and the

State of New Jersey as a "necessary defendant" by filing a Complaint in the Superior Court of New Jersey, Chancery Division, Hudson County, on November 9, 1984. The Writ here is sought by only seven of these residents.

In their complaint, petitioners alleged that to the extent that the Compact of 1834 has been interpreted or construed as permitting the exercise of sovereignty over Ellis and Liberty Islands by New York, rather than New Jersey, the Compact is void and *ultra vires* the powers of the signatories.

The complaint further alleges that each petitioner was a resident, citizen and taxpayer of New Jersey who suffered injury as a direct beneficiary of lands held in trust by the sovereign, New Jersey, for the benefit of the people of New Jersey. Petitioners Frank J. Guarini, Gerald McCann, Dr. Irwin Silverman, and John J. Stiles, relied upon their status in such capacity to bring this suit.

Petitioners claimed further injury by virtue of the levy and collection of sales and income taxes by New York, which they claim have deprived and will continue to deprive New Jersey of tax revenues. Petitioners claimed that such tax revenues, if collected by New Jersey, would lessen the tax burden on them by providing greater revenues to New Jersey.[1]

Petitioner Colon alleged too that she once paid $1.35 in sales tax to New York while on Liberty Island for her purchase of a replica of the State of Liberty, a banner and a souvenir plate

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[1] A "Memorandum of Understanding In Regard to Establishing a Bi-State Public Corporation To Be Known As The Statue of Liberty Trust Fund" was signed by Governors Cuomo and Kean, on June 30, 1986. The purpose of the agreement is to aid homeless persons in both States through grants of money collected by the Fund. Revenue for the Fund will come from taxes collected by both states directly related to the Islands. The proposed agreement has been approved by the NJ legislature (N.J. brief, 2)[2] and is currently pending approval by the New York State Legislature.

[2] References to "N.J. brief, ____" are page references to the brief and appendix filed by the State of New Jersey.

and that the amount of sales tax paid to New York was greater than that which she would have been required to pay to New Jersey if New Jersey had been the sovereign exercising governmental authority over Liberty Island.

Petitioners Bisharian and Irwin, as members of the United Association of Plumbers, Pipe Fitters and Sprinkler Fitters, Local 274, AFL-CIO, located in Ridgefield, New Jersey, alleged the additional injury of loss of job opportunities. That allegation was based upon their unsupported belief that labor contracts for restoration and construction on Liberty and Ellis Islands have been and would continue to be awarded to New York unions because of New York's allegedly wrongful exercise of governmental authority over the Islands.

By way of relief, the Complaint sought a declaration *inter alia*, that the 1834 Compact, entered into between New York and New Jersey and approved by Congress, is "void and *ultra vires* the powers of the signatories" and that certain police and sovereign powers over Ellis and Liberty Islands, which includes the power to levy and collect taxes, are being wrongfully exercised by New York. Petitioners requested that a constructive trust be imposed upon tax revenues already collected by New York and that an injunction issue restraining New York from future collection of taxes. Petitioners also sought certain declarations presumed to have some potential bearing upon the award of contracts to labor unions in New Jersey for renovations on Liberty Island and future construction on Ellis Island. Nowhere in the original complaint did petitioners allege that any of their constitutional or federal statutory rights had been violated.

B. *Proceedings Below*

On December 19, 1984, New York filed a Petition for Removal to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1441, *et seq.* It filed its Answer to the Complaint in the District Court on December 26, 1984 and filed an Amended Answer on January 15, 1985.

Petitioners' motion to remand this action to the Superior Court of New Jersey was granted, on or about August 28, 1985, on

the ground that the removal petition was silent as to why New Jersey had not consented to removal. On September 23, 1985, the District Court denied New York's motion to reconsider its order of remand.

Following remand, the State of New York filed an Answer and a motion to dismiss the Complaint on the grounds, *inter alia*, that the action is barred in the state courts of New Jersey by the doctrine of sovereign immunity; that the Supreme Court of the United States has original and exclusive jurisdiction over the true subject matter of this action; and that petitioners lack standing to bring this action in the state courts of New Jersey.

Petitioners filed a cross-motion for summary judgment, which addressed the merits of their claims. The State of New Jersey filed an Answer urging dismissal of the Complaint (N.J. brief, 16a) but submitted a letter brief opposing New York's motion to dismiss and supporting petitioners' cross-motion for summary judgment.

Argument on the cross-motion was heard by Judge Humphreys on January 17, 1986. In an oral opinion rendered on March 18, 1986 (subsequently edited and submitted for publication, *Guarini v. The State of New York*, 215 N.J. Super. 426, 521 A.2d 1362 (Ch. Div. 1986)), Judge Humphreys dismissed the Complaint and denied petitioners' motion for summary judgment. (Pet. 8a-49.1a).[3] The court held that due to (i) a lack of subject matter jurisdiction over the gravamen of the Complaint, (ii) the sovereign immunity of the State of New York, (iii) considerations of interstate comity, and (iv) petitioners' lack of standing, petitioners have no right to litigate these claims against respondents in the state courts of *New Jersey*. The order of dismissal was entered on April 1, 1986 and petitioners appealed.

The Appellate Division, in a *per curiam* opinion filed on November 21, 1986, affirmed substantially for the reasons expressed by the trial court. 215 N.J. Super. 293, 521 A.2d 1294 (App. Div. 1986). The Petition for Certification was denied and the appeal was dismissed by the New Jersey Supreme Court. (Pet. 1a-2a).

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[3] Page references to "Pet. ____a" are to the Appendix to the Petition.

REASONS FOR DENYING THE WRIT

In their Statement of the Case, petitioners attempt to persuade this Court that the New Jersey state courts were in error for refusing to reach the merits of their claims as well as for refusing to construe the provisions of the 1834 Compact. Moreover, they attempt to raise constitutional issues, such as violations of the commerce clause and the due process clause of the Fourteenth Amendment, which were not raised before the trial court.

Both the trial court and the New Jersey appellate courts properly disposed of this case on four independent grounds. The State of New York respectfully submits that all four reasons for dismissal are valid and that petitioners have failed to cite any authority which would justify disturbing the decisions of the New Jersey courts or warrant review by this Court.

A. *The Courts Below Correctly Determined That the State Courts of New Jersey Lack Jurisdiction Over this Action*

The true substance of the Complaint was aptly described by the trial court below. It noted that this action could be characterized as either (1) a border dispute between two states, (2) an action to abrogate or modify an interstate Compact, or (3) an action seeking a declaration of the rights of each State under that Compact. The trial court correctly determined that the state courts of New Jersey lack jurisdiction in all of these instances. (Pet. 13a).

If this action is viewed as a border dispute, it could only be initiated by one of the States before this Court and not by these petitioners before a New Jersey state court. *Nebraska v. Iowa*, 406 U.S. 117 (1972); *Ohio v. Kentucky*, 410 U.S. 641 (1973). Judge Humphreys correctly rejected petitioners' argument that he should exercise jurisdiction because the Supreme Court has deferred to other forums in certain disputes between states and ruled that this is "a classic case" for the exercise of original and exclusive jurisdiction by the United States Supreme Court. (Pet. 14a-15a); *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

The New Jersey trial court specifically noted that the issues presented by the Complaint do not arise in the context of a suit by private parties over private property rights, claims over which an appropriate state court may exercise jurisdiction, even though a resulting judgment would not be binding upon the States. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Durfee v. Duke*, 375 U.S. 106 (1963). The trial court further determined that it did not have the power to abrogate or modify an interstate compact approved by Congress. *Texas v. New Mexico, supra.*

Petitioners have cited *Arizona v. New Mexico*, 425 U.S. 794 (1976), for the bald proposition that issues which might properly be raised between States, in an original action in the Supreme Court, may be conclusively determined in state court actions. Petitioners completely ignore, however, the circumstances of that case – circumstances which are in no way analogous to those which exist here. In *Arizona v. New Mexico*, New Mexico's taxing authority was challenged in its own courts, not in the courts of a sister state. Moreover, a political subdivision of the State of Arizona had joined in initiating that declaratory judgment action in the New Mexico state court. In contrast, the State of New York has appeared in New Jersey state court in this case, as a party defendant, very much against its will. New York has consistently maintained that a New York court would be the proper forum in which to challenge an exercise of New York's taxing power. *See Hill v. Joseph*, 205 Misc. 441, 129 N.Y.S. 2d 348 (Sup. Ct. N.Y. Co. 1954). The New Jersey Appellate Division agreed:

> Our affirmance of the judgment under review is without prejudice to the right of plaintiff Nidia Davila Colon to seek refund of the $1.35 sales tax paid to the state of New York or the City of New York, as the case may be, in connection with the purchase of items from the concession at Liberty Island in the appropriate New York court. This issue was not specifically raised before or decided by the trial court and counsel for the State of New York have recognized plaintiff

> Colon's right as an individual to seek such refund. *See Hill v. Joseph*, 205 Misc. 441, 129 N.Y.S. 2d 348 (Sup. Ct., Special Term 1954). (Pa 3a).

Petitioners should not be permitted to don the mantle of the State and to litigate in a state court issues which, if raised by either State, would be committed by the Constitution and laws of the United States to the original and exclusive jurisdiction of this Court. U.S. Const., Act., III, Sec.2, Cl.2; 28 U.S.C. §1251(a).

B. *This Action is Barred By the Doctrine of Sovereign Immunity*

Both New Jersey and New York are sovereign states. The trial court determined that New York's activities with regard to the Islands are not as a trespasser or interloper, but rather, are pursuant to the express terms of the interstate Compact. (Pet. 29a). Both New York and New Jersey recognize the doctrine of sovereign immunity except where it has been specifically waived by legislation (Pet. 21a); *see Glen v. Rockefeller*, 61 *Misc. 2d* 942, 307 N.Y.S.2d 46 (Sup. Ct. N.Y. Co. 1970) *aff'd*, 34 A.D.2d 930, 313 N.Y.S.2d 938 (1st Dept. 1970); *Cass v. State*, 58 N.Y.2d 460, 448 N.E.2d 786 (1982); *see also* New Jersey Tort Claims Act. *N.J.S.A.* 59:1-1, *et seq.*; *English v. Newark Housing Authority*, 138 N.J. Super. 425, 427-429, 451 A.2d 358 (App. Div. 1976). Given the existence of the doctrine in both States, the trial court explicitly and correctly rejected petitioners' argument that the ruling of the Supreme Court in *Nevada v. Hall*, 440 U.S. 410 (1979), would permit maintenance of this action.

Although the Supreme Court ruled in *Nevada* that the state courts of California did have jurisdiction over the State of Nevada, such jurisdiction was exercised within the extremely narrow context of a tort action. There, an employee of the University of Nevada travelled into California and caused injury to California residents on a California highway. In permitting a state court in California to exercise jurisdiction over the State of Nevada, the Supreme Court was very careful to note that:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different State policies, either of California or of Nevada, might require a different analysis or a different result. 440 *U.S.* at 424 n. 24.

This case does require a "different analysis" and a "different result." As was noted by the trial court:

> Plaintiffs in this case have no property rights or interests in the islands or in the statute. Their personal rights are indistinguishable from those of other New Jersey residents. Plaintiffs are challenging in a suit in New Jersey the authority of New York State over land bordering the two states. Plaintiffs, if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 Compact. Exercise of jurisdiction by this Court would thereby pose a "substantial threat to our constitutional system of cooperative federalism." (Pet. 24a).

There is no conflict between the policies of the State of New Jersey and New York in this case. There is a single Compact and, until the States themselves decide otherwise, a single policy which governs the rights of both States. It is highly significant that the State of New Jersey has never taken issue with New York's sovereign immunity defense. Nor did New Jersey even suggest to the trial Court that New York's defense of sovereign immunity is in conflict with New Jersey's own public policy or somehow denies recognition to a significant policy of the State of New Jersey.

Indeed, in this Court, New Jersey has stated that "What is clear from the majority in *Nevada v. Hall*, is that the

acceptance of a sister state's claim of sovereign immunity is a matter of state law, not constitutional compulsion. *id.* at 418-419, 425-427. Accordingly, there is no basis to grant review of this application of New Jersey law and policy." (N.J. brief, pg. 13-14).

C. *The Principle of Comity Bars this Action*

The trial court dismissed the complaint on the additional ground that permitting this action would "violate principles of comity between states fundamental to our federal system." The court found that the issues raised here go to the "very heart of the governmental function" and that the public policy of New Jersey would not be contravened by the Court's refusal to hear this suit. (Pet. 36a).

The trial court's ruling is buttressed by the Constitutional commitment of disputes between states over territory to the original and exclusive jurisdiction of the Supreme Court of the United States (*see* Point A, *infra*), and by the conviction that discussion and accommodation, such as the Memorandum of Understanding entered into between the Governors (*see* footnote 1, *supra*), are preferable to litigation (*see Texas v. New Mexico*, *supra*, 462 U.S. 554). As the trial court observed, the litigation of disputes between states in the courts of one of the states involved "would give the appearance if not the fact of blatant partisanship" and would produce "discord and ill feeling, not amity and comity". (Pet. 41a). A review of New Jersey case law reveals that, in keeping with the concept of comity, New Jersey courts have often declined to exercise jurisdiction over New York. *See Interstate Wrecking Co., Inc. v. Palisades Interstate Park Comm'n*, 57 N.J. 342, 273 A.2d 10 (1971); *Liquid Carbonic Corp. v. City of New York*, 150 N.J. Super. 119, 374 A.2d 1258 (App. Div. 1977). *But see Martin v. Educational Testing Service, Inc.*, 179 N.J. Super. 317, 431 A.2d 868 (Ch. Div. 1981). This case does not warrant departure from a principle so vital to interstate relations.

D. *Petitioners Lack Standing To Bring This Case Against These Respondents*

No controversy presently exists between the parties with the sole right to litigate the issues raised by the complaint, *i.e.*, the States of New Jersey and New York. If such a controversy did exist, petitioners would be strangers thereto. *Bergen County v. Port of N.Y. Authority*, 32 N.J. 303, 160 A.2d 811 (1960). As the State of New Jersey has correctly pointed out, standing is an issue of State law.* (N.J. brief, p. 15) Petitioners lack even the "slight additional private interest" sufficient to afford standing in New Jersey. *Salorio v. Glaser*, 82 N.J. 482, 14 A.2d 943, *appeal dismissed* and *cert. denied*, 449 U.S. 804, 449 U.S. 874 (1980). Their interests are, in the words of the trial court, of "gossamer texture" and "are no more nor less than any citizen of the United States." (Pet. 44a). These petitioners, as individual citizens, have no right to assert claims which are among the prerogatives of a sovereign state government. The State of New Jersey has agreed with the State of New York that petitioners lack standing to bring this suit. (Pet. 37a-38a).

In dismissing the Complaint, the trial court noted that the elected representatives of the people must govern and that private individuals can neither exercise rights of sovereignty reserved to state governments nor ask a court to do so for them. (Pet. 47a). The petitioners have pointed to no authority which supports their attempted usurpation of sovereign governmental right and authority. As the New Jersey Supreme Court has noted, standing is an issue which must be determined by reference to the other parties and to the subject matter of the litigation. *See New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 82 N.J. 57, 411 A.2d 168 (1980). A court has a right and an obligation to determine where

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* In support of their motion to remand the action to the State Courts of New Jersey, petitioners vigorously argued, *inter alia*, that the case should be remanded to the State Court of New Jersey because this lawsuit is "predicated on standing under New Jersey state law and not on federal constitutional standing." Brief in support of motion to remand case to state court returnable January 28, 1985, at 6.

a litigation, if permitted to proceed, is likely to lead, before being asked to recognize plaintiffs' right to bring the action in the first instance. Given the serious jurisdictional and sovereign immunity issues present in this case and the tenuous relationship of these petitioners to the other parties and to the real subject matter of the suit, it is respectfully submitted that it would be difficult for a New Jersey state court to have any degree of confidence "in the integrity and soundness of [its] adjudication." *Id.* The trial court's determination that these petitioners lack standing is correct and should not be disturbed.

CONCLUSION

All of the issues in this case have been correctly decided by the New Jersey courts below. It is respectfully submitted that this case presents no reasons for discretionary review by this Court.

Accordingly, the petition for a writ of certiorari should be denied.

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No. 86-1739

Supreme Court, U.S.
FILED
JUL 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

FRANK J. GUARINI, GERALD McCANN, DR. IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN,
Petitioners,

-vs-

THE STATE OF NEW YORK, and THE STATE OF NEW JERSEY,
Respondents.

PETITIONERS' REPLY MEMORANDUM

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IN THE
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FRANK J. GUARINI, GERALD McCANN, DR. IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN

Petitioners,

vs.

THE STATE OF NEW YORK and THE STATE OF NEW JERSEY

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

PETITIONERS' REPLY MEMORANDUM

A. REPLY TO THE STATEMENT OF THE CASE.

The State of New York bases its presentation upon the argument that it has sovereignty over Ellis Island and Liberty Island pursuant to the Compact of 1834 (4 U.S. Stat. 708, ch 126), (granting only limited jurisdiction to New York) and that New York's collection of sales taxes on those islands was permitted by the Compact. Petitioners take issue with these assertions and argued consistently that under the terms of the Compact sovereignty over the islands belongs to the State of New Jersey.

New York would like this Court to believe that petitioners' only cause of action is a direct attack on the validity of the Compact. However, the theory of petitioners' case, as clearly

reflected in Count I of the Complaint, is that the Compact is valid and that the Compact gave sovereignty to New Jersey, not New York. The attack on the validity of the Compact was an alternative theory, pleaded in Count II of the Complaint, and never pressed by petitioners. New York, throughout this entire litigation, has latched onto that alternative theory and attempted to muddle the record by focusing only on this alternative theory.

New York also attempts to create the impression that petitioners did not raise the constitutional issues before the trial court. However, as set forth on pages 12 through 15 of the Petition, the issue was clearly raised before the trial court and as set forth below, the

federal question was properly presented.

B. THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION WERE PROPERLY RAISED BEFORE THE STATE COURTS.

Contrary to the representations contained in the Brief in Opposition filed on behalf of the State of New York, petitioners raised the constitutional issues of wrongful taxation in violation of the Commerce Clause and the Fourteenth Amendment to the Constitution before the trial court.

On pages 12 and 13 of the Petition, petitioners demonstrate that this legal theory was presented and argued before the trial court. Also, as demonstrated on pages 13, 14 and 15 of the Petition, the factual allegations necessary to support those claims were

pleaded. No one contests that these allegations and arguments were presented to the trial court and no one explains why they are inadequate.

Furthermore, this issue was preserved before the appellate courts of the State. Before the Superior Court of New Jersey, Appellate Division, the following argument was presented:

> As set forth in the Statement of Facts above, plaintiffs contend that Liberty and Ellis Islands fall within the taxing sovereignty of the State of New Jersey. New York has been taxing sales transactions on those islands and, at bar, taxed a specific sales transaction of a particular plaintiff. This is a blatant violation of the Commerce Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment.

This was followed by a lengthy discussion of McLeod v. J.E. Dilworth

Co., 322 U.S. 327 (1944) and Miller Bros. Co. v. Maryland, 347 U.S. 340 (1950). Before the New Jersey Supreme Court petitioner made the following argument:

> Special reasons exist that support plaintiffs' contention that this petition should be granted pursuant to R. 2:12-4. The State of New York's taxing activity on Ellis and Liberty Islands is in clear violation of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution because one state may not tax sales transacitons in another state. McLeod v. J.E. Dilworth Co., 322 U.S. 327, 88 L.Ed. 1304 (1944); Miller Bros. Co. v. Maryland, 347 U.S. 340, 98 L.Ed. 744 (1954). Since New Jersey is sovereign over the two islands pursuant to the 1834 Compact, New York is illegally imposing a sales tax on merchandise bought and sold within the sovereign territory of the State of New Jersey.

Despite the fact that these arguments

were raised, none of the state courts chose to pass on the issue.

A determination of whether a federal question is "specially set up or claimed" under 28 U.S.C. sec. 1257(3) is based on state law. Central Union Co. v. Edwardsville, 269 U.S. 190, 194-195 (1925); Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 462-63 (1936); Parker v. Illinois, 333 U.S. 571, 574-75 (1948); Michel v. Louisiana, 350 U.S. 91, 93 (1955).

Under the New Jersey Rules of Court, fact pleading is required. N.J. Ct. Rule 4:8-1. It is not necessary or expected in the pleadings in the New Jersey courts to plead the legal theory; rather it is only necessary to plead the facts that give

rise to the claim. Jersey City v. Hague, 18 N.J. 584, 587-588, 115 A. 2d 8 (1955); Locks Laboratories v. Bloomfield Molding Co., 35 N.J. Super. 422, 429, 114 A. 2d 457 (App. Div. 1955). At bar, the facts were pleaded in the Complaint and the constitutional issue was directly raised in the brief.

The federal question must be presented precisely to the state court, and "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." New York, ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). The Court has also phrased the rule in the following manner: "Our jurisdiction does not depend on citation to book and

verse." Eddings v. Oklahoma, 455 U.S. 104, 113-114 n. 9 (1982). By citing the case of McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944) petitioners drew into question the specific federal provision that is the subject of the case, i.e., violation of the Commerce Clause by imposition of a sales tax in another State. This is a specific argument. Under 28 U.S.C., sec. 1257(3), exercise of state authority contrary to federal law is a valid basis for this Court's exercise of jurisdiction. Cf. Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976) (the wrongful levy of State sales tax or exempt federal instrumentality).

C. THE LOWER COURT'S RULING THAT THIS SUIT WAS BARRED BY SOVEREIGN IMMUNITY AND COMITY WAS BASED ON FEDERAL, CONSTITUTIONAL CONSIDERATIONS.

New Jersey's opposing brief makes the argument that the lower courts primarily relied on State law in dismissing the case. While this may constitute vigorous advocacy, it does not fully and accurately disclose the holdings below.

The trial court's ruling on the issue of sovereign immunity, was based on an interpretation of Nevada v. Hall, 440 U.S. 410 (1979). The trial court specifically held that one state could claim sovereign immunity in the jurisdiction of the state courts of a sister state. This ruling was not based on the state laws of New York or New Jersey, but rather on the trial court's interpretation of the majority opinion

and heavy reliance on the dissents in Nevada v. Hall, supra.

Similarly the trial court's determination on the issue of comity was intertwined with the trial court's theory that there was a federal principle suggested in Nevada v. Hall that bars this lawsuit.

However, such a determination is in fact contrary to federal law. The State courts of New Jersey cannot simply decline to hear a challenge to State action when that challenge is based on federal constitutional grounds. General Oil Co. v. Cain, 209 U.S. 211, 228 (1908) explained that denial of review of a constitutional question on State jurisdictional grounds can still be reviewed by the Supreme Court:

> "It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court."

Respondents' suggestion that petitioner Colon should attempt to apply for a refund in New York does not provide petitioner with an adequate remedy. Petitioner Colon seeks to enjoin the wrongful taxation, not just a refund, which is all New York has to offer. A refund alone is clearly inadequate. See Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673, 678-679 (1930). Also, the wrongful taxation physically occurred within the territory of the State of New Jersey. Petitioner should not be required to travel to a different state

to enforce her rights.

In sum, the state courts of New Jersey erred in declining to hear these issues on the grounds of sovereign immunity or on any grounds.

D. THE QUESTION OF STANDING BEFORE THIS COURT IS A MATTER THAT MUST BE DETERMINED INDEPENDENTLY ON THE BASIS OF FEDERAL LAW.

This Court must bring its own independent judgment to the question of standing. Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). The obligation of state courts to enforce federal rights further obligates the state courts to recognize the standing of plaintiffs that rises to the level of federal standing. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526 (1959).

Petitioner Colon is challenging

the actual collection of a sales tax from her within New Jersey pursuant to the law of New York. As argued in the petition, this constitutes standing under federal law.

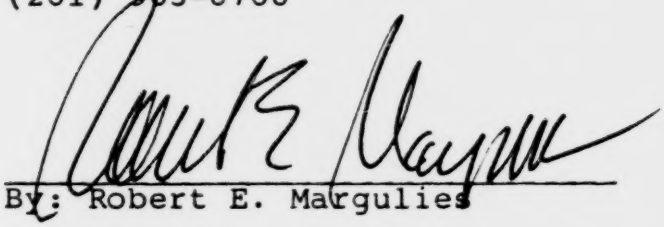
The issue of which State is sovereign over Ellis Island and Liberty Island under the terms of the Compact of 1834 is an issue that must be resolved to determine if the taxation is unconstitutional. This issue is clearly drawn into issue by the direct injury to petitioner Colon, i.e., the tax collected from her. Because of the direct connection, petitioner should be permitted to litigate this issue, as she should be permitted to litigate any and all issues within the direct scope of her standing.

E. CONCLUSION.

For the reasons stated above and in the petition, it is respectfully submitted that substantial issues have been submitted for review and that this petition for certiorari should be granted.

Respectfully submitted,

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